

(23,958)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 807.

THE CITY OF NEW YORK, PETITIONER,

vs.

WILLIAM SAGE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

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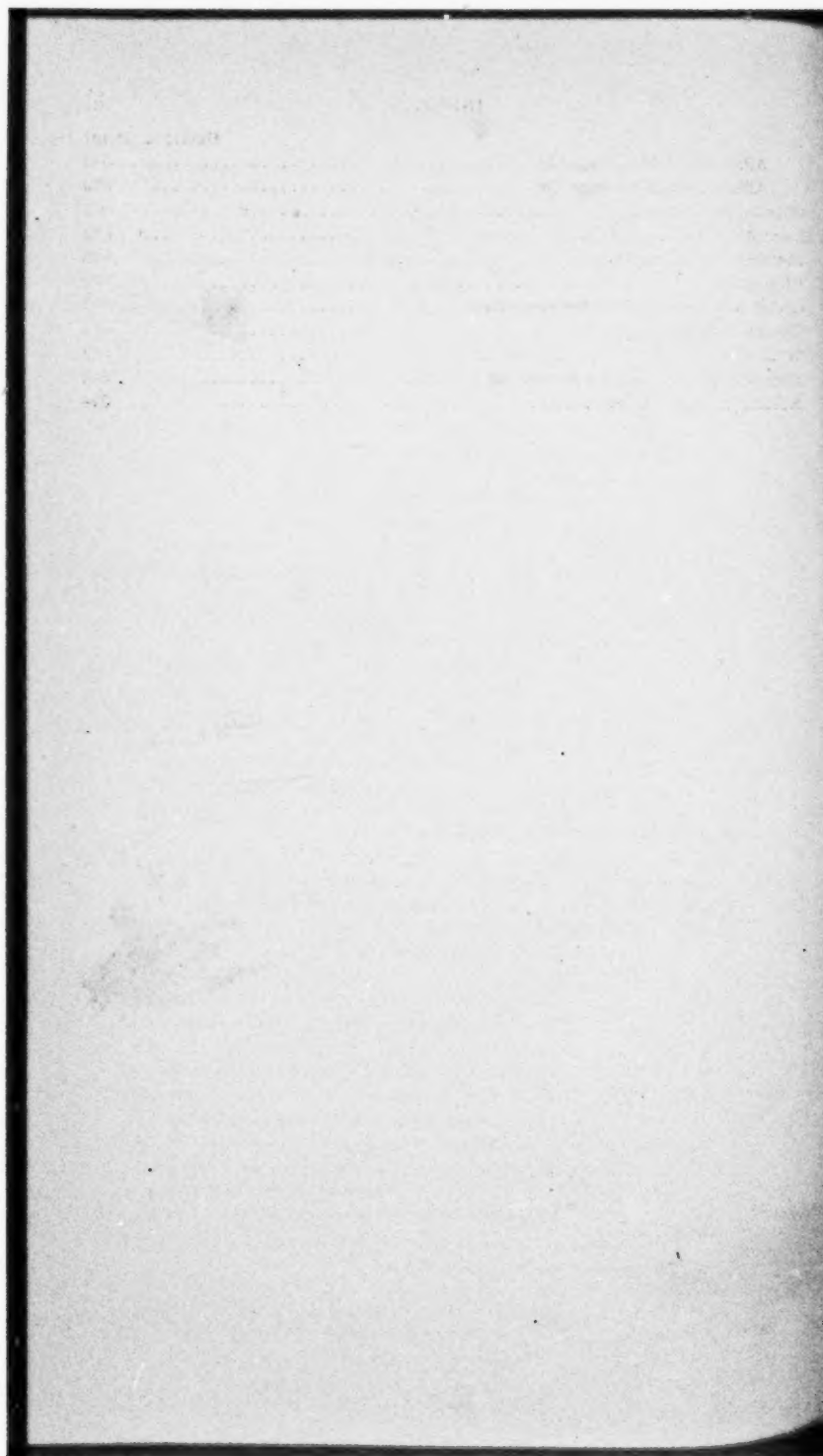
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Petition for Writ of Error.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Application and Petition of
JOHN A. BENSEL, CHARLES N.
CHADWICK and CHARLES A.
SHAW, constituting the Board
of Water Supply of The City
of New York, to acquire real
estate for and on behalf of The
City of New York, under Chap-
ter 724 of the Laws of 1905
and the Acts amendatory there-
of, in the Town of Hurley, Ul-
ster County, New York for the
purpose of providing an addi-
tional supply of pure and
wholesome water for the use
of The City of New York.

Ashokan
Reservoir,
Parcel 733,
Section 15.

2

3

THE CITY OF NEW YORK,
Petitioner,

against

WILLIAM SAGE, JR.,
Claimant.

And now comes The City of New York, petitioner
herein, and says that on or about November 2, 1911,

4 this Court entered judgment herein in favor of William Sage, Jr., the claimant, and against this petitioner, in which judgment and proceedings had prior thereunto in this matter, certain errors were committed to the prejudice of this petitioner, of all of which more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this petitioner prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Southern District, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be
5 sent to the Circuit Court of Appeals.

Dated, New York, December 7, 1911.

ARCHIBALD R. WATSON,
Corporation Counsel,
City of New York,
Attorney for Petitioner.

Copy received.

New York, Dec. 15, 1911.

EDWARD A. ALEXANDER,
Attorney for Claimant.

6 Filed December 15, 1911.

Petition for Writ of Error.

7

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Application and Petition of
 JOHN A. BENSEL, CHARLES N.
 CHADWICK and CHARLES A.
 SHAW, constituting the Board
 of Water Supply of The City
 of New York, to acquire real
 estate for and on behalf of The
 City of New York, under Chap-
 ter 724 of the Laws of 1905
 and the Acts amendatory there-
 of, in the Town of Hurley, Ul-
 ster County, New York for the
 purpose of providing an addi-
 tional supply of pure and
 wholesome water for the use
 of The City of New York.

Ashokan
 Reservoir,

8

Parcel 733,

Section 15.

In re order di-
 recting pay-
 ment of ex-
 penses, dis-
 bursements,
 witness fees
 and counsel
 fees.

9

THE CITY OF NEW YORK,
 Petitioner,
 against

WILLIAM SAGE, JR.,
 Claimant.

Now comes The City of New York, petitioner
 herein, and says that on or about November 2nd,
 1911, this Court entered judgment herein in favor

10 of William Sage, Jr., the claimant, for expenses, disbursements and counsel fees alleged to be due the said William Sage, Jr., by reason of the proceedings had herein before the Commissioners of Appraisal on Parcel 733, Ashokan Reservoir, Section 15, and against this petitioner, in which judgment and proceedings had prior thereunto in this matter, certain errors were committed to the prejudice of this petitioner, all of which more in detail appear from the assignment of errors which is filed with this petition.

11 Wherefore this petitioner prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Southern District, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals.

Dated, New York, December 12, 1911.

ARCHIBALD R. WATSON,
Corporation Counsel of the City of New York,
Attorney for Petitioner.

Copy received Dec. 15, 1911.

EDWARD A. ALEXANDER,
Attorney for Claimant.

12

Filed December 15, 1911.

Writ of Error.

13

United States of America, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Judges of the Circuit Court of the United States, for the Southern District of New York,

Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between In the Matter of the Application and Petition of John A. Bensel, Charles N. Chadwick and Charles A. Shaw, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York, under Chapter 724 of the Laws of 1905 and the Acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York Ashokan Reservoir, Parcel 733, Section 15, the City of New York, Petitioner, vs. William Sage, Jr., Claimant, a manifest error hath happened, to the great damage of the said petitioner, as is said and appears by this complaint, We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before

14

15

- 16** the Judges aforesaid, on the third day of January, 1911, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit, may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief

this 14th day of December, in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hundred and thirty-sixth.

17

(Seal)

JOHN A. SHIELDS,

Clerk of the Circuit Court of the
United States of America, for the
Southern District of New York,
in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

Copy received this 15th day of Dec., 1911.

18

EDWARD A. ALEXANDER,
Attorney for Claimant.

Filed Dec. 15, 1911.

Writ of Error.

19

United States of America, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Judges of the Circuit Court of the United
States, for the Southern District of New
York,

Greeting:

Because, in the record and proceedings, as also
in the rendition of the judgment of a plea which
is in the Circuit Court, before you, or some of you,
between In the Matter of the Application and Pe-
tition of John A. Bensel, Charles N. Chadwick and
Charles A. Shaw, constituting the Board of Water
Supply of the City of New York, to acquire real
estate for and on behalf of the City of New York,
under Chapter 724 of the Laws of 1905 and the
Acts amendatory thereof, in the Town of Hurley,
Ulster County, New York, for the purpose of pro-
viding an additional supply of pure and wholesome
water for the use of the City of New York Ashokan
Reservoir, Parcel 733, Section 15, the City of New
York, Petitioner, vs. William Sage, Jr., Claimant,
a manifest error hath happened, to the great dam-
age of the said petitioner, as is said and appears
by this complaint, We, being willing that such
error, if any hath been, should be duly corrected,
and full and speedy justice done to the parties
aforesaid in this behalf, Do Command you, if
judgment be therein given, that then under your
seal, distinctly and openly, you send the record
and proceedings aforesaid, with all things concern-
ing the same, to the Judges of the United States
Circuit Court of Appeals for the Second Circuit,
at the City of New York, together with this writ,
so that you have the same at the said place, before

20

21

22 the Judges aforesaid, on the third day of January, 1911, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit, may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 14th day of December, in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hundred and thirty-sixth.

23

(Seal)

JOHN A. SHIELDS,

Clerk of the Circuit Court of the
United States of America, for the
Southern District of New York,
in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

Copy received this 15th day of Dec., 1911.

24

EDWARD A. ALEXANDER,
Attorney for Claimant.

Filed Dec. 13, 1911.

Petition for Removal to United States 25
Circuit Court.

NEW YORK SUPREME COURT,

ULSTER COUNTY—THIRD JUDICIAL DISTRICT.

In the Matter

of

The Application and Petition of
 JOHN A. BENSEL, CHARLES N.
 CHADWICK and CHARLES A.
 SHAW, constituting the Board
 of Water Supply of The City
 of New York, to acquire real
 estate for and on behalf of the
 City of New York, under Chap-
 ter 724 of the Laws of 1905 and
 the Acts amendatory thereof,
 in the Town of Hurley, Ulster
 County, New York, for the pur-
 pose of providing an additional
 supply of pure and wholesome
 water for the use of the City of
 New York.

26

Ashokan
 Reservoir,
 Section No. 15,
 Parcel No. 733,
 William Sage,
 Jr., Claimant.

27

The petition of William Sage, Jr., respectfully
 shows to your Court and alleges:

That on the 22d day of May, 1909, the above-
 named John A. Bensel, Charles N. Chadwick and
 Charles A. Shaw, constituting the Board of Water
 Supply of The City of New York, pursuant to Chap-
 ter 724 of the Laws of 1905 and the Acts amend-

28 atory thereof, filed a petition herein in the Supreme Court of the State of New York, Ulster County, dated May 21st, 1909, praying for the appointment of three (3) Commissioners of Appraisal to appraise the value of the land therein mentioned, of which Parcel No. 733, which is hereinafter described, was then and for some time prior thereto been owned in fee by your petitioner, and to exercise all of the other powers of Commissioners of Appraisal, as provided for in the said Act.

29 That thereafter the prayer of the said petition was granted, and pursuant thereto, on the 22d day of May, 1909, three (3) Commissioners were duly appointed herein by the Supreme Court, Ulster County, by order duly made and entered in the office of the Clerk thereof, and thereafter, on the 27th day of May, 1909, in compliance with law, the said Commissioners took, subscribed and duly filed their oaths of office in the office of the Clerk of Ulster County, and on May 28th, 1909, duly filed certified copies of the said oaths in the office of the Clerk of New York County, as provided by law.

30 That Section 11 of Chapter 724 of the Laws of 1905 and the Acts amendatory thereof, expressly provides that upon the said Commissioners of Appraisal filing their oaths as aforesaid, the City of New York shall become seized in fee of the property mentioned in the aforesaid petition.

That thereafter, under and pursuant to Chapter 724 of the Laws of 1905 of the State of New York, and as therein expressly provided, the fee simple of the parcel of land designated in the said petition as Parcel No. 733, of which your petitioner was the owner in fee at the time when the said Commissioners of Appraisal filed their said oaths as aforesaid, which parcel is bounded and described as follows, was taken from your petitioner by force of

the said statute, and the fee simple thereof became **31**
vested in the said City of New York :

“Beginning at the northwest corner of parcel No. 736, in the easterly line of parcel No. 735, and running thence partly along said line, N. 29 degrees 39 minutes W. 613.9 feet to the most southerly point of parcel No. 734; thence along the easterly line of said parcel, N. 24 degrees 33 minutes E. 354.8 feet to the northeast corner of same, in the center of a road leading from West Hurley to Glenford; thence along the center line of said road, and partly along the northerly line of said parcel, N. 64 degrees 02 minutes w. 124 feet to the most northerly point of said parcel, in the before mentioned easterly line of Parcel No. 735; thence partly along said line, and continuing along the center line of said road, N. 42 degrees 35 minutes W. 85.6 feet and N. 26 degrees 47 minutes W. 534.6 feet to the southwest corner of parcel No. 730; thence along the southerly line of said parcel N. 59 degrees 00 minutes E. 368. feet to the southeast corner of same, in the southerly line of parcel No. 729; thence partly along said line, N. 59 degrees 00 minutes E. 1294.5 feet to the southeast corner of said parcel, in the west-
erly line of parcel No. 732; thence partly along said line S. 23 degrees 43 minutes E. 585 feet to the southeast corner of said parcel; thence along the southerly line of same, N. 63 degrees 08 minutes E. 1074.5 feet to the most easterly point of said parcel, thence N. 63 degrees 08 minutes E. 76.1 feet, S. 45 degrees 44 minutes E. 883. feet and S. 58 degrees 38 minutes W. 2101.1 feet to the most northerly point of before mentioned parcel No. 736, in the center of the before mentioned road leading from West Hurley to Glenford, thence partly along the **32**
33

- 34 northerly line of said parcel, S. 58 degrees 38 minutes W. 1120.7 feet to the point or place of beginning; containing 86.489 acres."

35 That at the time when your petitioner's aforesaid property vested in the City of New York in fee simple as aforesaid, your petitioner, by reason of the taking of the said property, its divesting from him and the vesting of the same as aforesaid in the said City of New York, acquired pursuant to the aforesaid Chapter 724 of the Laws of 1905, a valid claim and cause of action against the City of New York for the fair and reasonable market value of his aforesaid property, which at the time of the taking by the said City as aforesaid was far in excess of \$5,000, and the said City of New York has not paid to your petitioner the said value of his said property, or anything on account of his aforesaid claim and cause of action, and the full, fair and reasonable market value of the said property is now justly due and owing from the said City of New York to your petitioner, and your petitioner is entitled to file a claim against the said City of New York for the damages sustained by him.

36 That under and pursuant to Chapter 724 of the Laws of 1905 and the Acts amendatory thereof and supplemental thereto, and as therein provided, your petitioner has three (3) years from the 22d day of May, 1909, to file his claim, and your petitioner is not now in default, and your petitioner further alleges that he has not yet filed his said claim and has not appeared in the above proceeding, and that upon the filing of the said claim and not prior thereto, the petitioner is entitled to offer evidence in support of and to prove the said claim.

Your petitioner further alleges that the above entitled proceeding is now pending and at the time of the commencement of the said proceeding, and ever since the same, and at time of the taking as

aforesaid your petitioner has been and now is a resident and citizen of the State of New Jersey, and resides in Orange, Essex County, New Jersey, and your petitioner further alleges that the City of New York is and at all of the times herein mentioned was a municipal corporation duly organized and existing under and by virtue of the laws of the State of New York, and has its principal place of business in the Borough of Manhattan, City of New York, in the Southern District of New York, and that John A. Bense, Charles N. Chadwick and Charles A. Shaw, constituting the Board of Water Supply of The City of New York, are citizens and residents of the State of New York. 37

Your petitioner further alleges that this is a controversy between citizens of different States, and that the property which was taken from petitioner by the said City of New York, and by the said Board of Water Supply, was and is worth much more than \$5,000, and that more than \$5,000, exclusive of interest and costs, is involved herein. 38

Your petitioner further alleges that he herewith submits a good and sufficient bond as made and provided by the statute in such cases, and that he will, on or before the first day of the next ensuing term of the United States Circuit Court for the Southern District of New York, file therein a transcript of the record of this proceeding, and for the payment of all costs which may be awarded by said Court if the said Circuit Court shall hold that this proceeding was improperly or wrongfully removed thereto. That no previous application has been made for this order. 39

Your petitioner therefore prays that this Court proceed no further herein, except to make the order of removal as required by law, and to accept the bond presented herewith, and direct a transcript

40 of the record herein to be made for said Court, as provided by law, and as in duty bound, and your petitioner will ever pray.

Dated April 20th, 1910.

WILLIAM SAGE, Jr.,
Petitioner.

State of New York, }
County of New York, } ss.:

41 William Sage, Jr., being duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WILLIAM SAGE, Jr.

Sworn to before me this 20th }
day of April, 1910. }

JEROME H. BUCK,
Commissioner of Deeds,
New York City.

Filed May 26, 1910.

**Order Removing Proceeding to 43
United States Circuit Court.**

At a Term of the Supreme Court of the State of New York, held in the County of Ulster, at the Court House in the City of Kingston, State of New York, on the 29th day of April, 1910.

Present—Hon. JAMES A. BETTS, Justice.

In the Matter

of

The Application and Petition of JOHN A. BENSEL, CHARLES N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of The City of New York, to acquire real estate for and on behalf of the City of New York, under Chapter 724 of the Laws of 1905 and the Acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

Ashokan
Reservoir,
Section No. 15,
Parcel No. 733,
William Sage,
Jr., Claimant.

44

45

William Sage, Jr., the claimant herein, having petitioned this Court for an order transferring this proceeding to the United States Circuit Court for

46 the Southern District of New York, as far as it relates to Parcel No. 733, and it appearing to the Court that the said William Sage, Jr., has filed his petition for such removal, duly verified in the form prescribed by law, and that he has filed his bond in the form prescribed by law, with good and sufficient sureties, and it appearing to the Court that this is a proper cause for the removal to the said Circuit Court,

Upon motion of Edward A. Alexander, attorney for said petitioner, it is hereby

47 Ordered and adjudged that this proceeding be and it hereby is so far as it affects Parcel No. 733, Section No. 15, removed to the United States Circuit Court for the Southern District of New York, and the Clerk of this Court is hereby directed to make up the record in the said proceeding for transmission to said Court forthwith.

Enter,

JAMES A. BETTS,
Justice of Supreme Court.

**Notice of Motion for Appointment of 49
Commissioners of Appraisal.**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Application of JOHN A. BENSEL, CHARLES N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York, under Chapter 724 of the Laws of 1905, and the Acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

50

Ashokan
Reservoir,
Section No. 15,
Parcel No. 733.

WILLIAM SAGE, JR.,

Claimant,

against

THE CITY OF NEW YORK.

Petitioner.

51

Upon the annexed affidavit of Edward A. Alexander, duly verified the 10th day of October, 1910, upon all of the proceedings heretofore had herein

- 52 in this Court, and upon all of the proceedings heretofore had herein in the above entitled proceeding in the Supreme Court of the State of New York, Ulster County, the undersigned will move this Court at a stated term thereof, to be held in Room 124, in that part of the Court for the hearing of motions, in the Court House of this Court, in the Pose Office Building, in the Borough of Manhattan, City, County and State of New York, in the Southern District of New York, on the 21st day of October, 1910, at 10:30 o'clock in the forenoon on said day or as soon thereafter as counsel can be heard, for an order appointing three Commissioners of
- 53 Appraisal in the above entitled proceeding, pursuant to Chapter 724 of the Laws of 1905 of the State of New York and of the Acts amendatory thereof and supplemental thereto, and for such other, further and additional relief as to the Court may seem just and proper, together with the costs of this motion.

Dated New York, October 10th, 1910.

Yours, &c.,

EDWARD A. ALEXANDER,
Attorney for Claimant,
Office & Post Office Address,
165 Broadway,
Borough of Manhattan,
City of New York.

54

To ARCHIBALD R. WATSON, Esq.,
Corporation Counsel.

WILLIAM M. SPEER, Esq.,
Special Counsel.

Affidavit of Edward A. Alexander in 55
Support of Motion for Appoint-
ment of Commissioners of Ap-
praisal.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Application of JOHN A. BENSEL, CHARLES N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York, under Chapter 724 of the Laws of 1905, and the Acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

WILLIAM SAGE, JR.,
 Claimant,
 against

THE CITY OF NEW YORK,
 Petitioner.

56

Ashokan
 Reservoir,
 Section No. 15,
 Parcel No. 733.

57

58 United States of America,
 Southern District of New York, } ss.:
 City & County of New York,

Edward A. Alexander, being duly sworn, deposes and says: I am the attorney for William Sage, Jr., the above named claimant in the above entitled proceeding. The above entitled proceeding is a condemnation proceeding instituted by the City of New York, through its Board of Water Supply, pursuant to a special act of the Legislature of the State of New York, known as Chapter 724 of the Laws of 1905 and the Acts amendatory thereof and supplemental thereto, for the acquisition by the
 59 City of New York of lands in Ulster County, for the purpose of providing an additional supply of pure and wholesome water for the use of the inhabitants of the City of New York, and for the inhabitants of other cities specified in the aforesaid Act.

That on May 22nd, 1909, the above named John A. Benschel, Charles N. Chadwick and Charles A. Shaw, constituting the Board of Water Supply of the City of New York, filed a petition in the Supreme Court of the State of New York, Ulster County, dated May 21st, 1909, pursuant to the aforesaid Act, praying for the appointment of three Commissioners of Appraisal to appraise the value
 60 of the property specifically mentioned in the said petition, part of which property was and is the property of this claimant, which is known and designated in the above mentioned State Court proceeding as Parcel No. 733.

That the claimant, at the time of the filing of the said petition, was and for some time prior thereto had been, the owner in fee of said parcel of property, No. 733. That Chapter 724 of the Laws of 1905 of the State of New York expressly provides as follows:

"Sec. 11. On filing the said oath in the manner provided in the previous section, the City

“of New York shall be and become seized in fee of all those parcels of real estate which are on the maps in the fifth section referred to described as parcels, of which it has been determined that the fee should be acquired.” 61

That the prayer of the aforesaid petition, filed by the aforesaid Board of Water Supply, was granted and pursuant thereto on May 22nd, 1909, three Commissioners of Appraisal were duly appointed thereunder by an order of the said New York State Supreme Court, Ulster County, which was duly made and entered in the office of the Clerk thereof, and thereafter, on May 27th, 1909, in compliance with the laws of the State of New York then in force, the said Commissioners of Appraisal took, subscribed and duly filed their oaths of office in the office of the Clerk of Ulster County, and on May 28th, 1909, duly filed certified copies of said oaths in the office of the Clerk of New York County of the State of New York, as provided by law. 62

That pursuant to Section 11 of the aforesaid Chapter 724 of the Laws of 1905 of New York State, upon the said Commissioners of Appraisal filing their oaths as aforesaid, the City of New York became seized in fee of the property mentioned in the aforesaid petition, which included Parcel No. 733, the property of this claimant, the said claimant became divested of the fee simple of the said property which was then owned by him and in place and stead thereof, pursuant to the aforesaid statute and laws of the State of New York, became and now is, a claimant of the said City of New York and has against the said City of New York a legal, just and valid claim, to recover damages sustained by him, by reason of the taking of his property as aforesaid, which damages constitute the fair and reasonable market value of his property. 63

64 That the said City of New York has not paid the above named claimant the amount of the damages sustained by him for the taking of his property as aforesaid or anything on account of his aforesaid claim and cause of action and the full, fair and reasonable market value of the said property is now justly due and owing from the said City of New York to the above named claimant, and the said claimant is entitled to file a claim against the said City of New York for the damages sustained by him.

65 That pursuant to the aforesaid statute and laws of the State of New York, the above named claimant has three years from the 22nd day of May, 1909, within which to file his claim for the aforesaid damages, that he is not now in default, that he has not yet filed his said claim and has not appeared in the above entitled proceeding in the aforesaid State Court and upon the filing of his said claim and not prior thereto, the said claimant is entitled to offer evidence in support of and to prove his said claim. The said claimant at all of the times herein mentioned was and now is a resident and citizen of the State of New Jersey and then resided and now resides in Orange, Essex County, New Jersey, and the City of New York is and at all of the times herein mentioned was a municipal corporation, duly
66 organized and existing under and by virtue of the Laws of the State of New York, having its principal place of business in the Borough of Manhattan, City of New York, in the Southern District of New York, and John A. Benschel, Charles N. Chadwick and Charles A. Shaw, constituting the aforesaid Board of Water Supply, are citizens and residents of the State of New York.

That after the said City of New York had taken title to your claimant's property as aforesaid, the said claimant applied to the United States Circuit

Court for the Southern District of New York for the purpose of removing the trial of his claim from and out of the Supreme Court of the State of New York, to this Court. 67

That on or about April 20th, 1910, your said claimant filed his petition in the Supreme Court of the State of New York, Ulster County, setting forth among other things all of the facts, showing his right to have his said claim removed from the said State Court to this Court, and praying the said State Court for an order transferring the above entitled proceeding in the State Court, so far as it related to Parcel No. 733, to this Court. That the said petition for removal, filed in the said State Court as aforesaid, was duly verified in the form prescribed by law and appearing to the said State Supreme Court that the claimant had filed his bond in the form prescribed by law, with good and sufficient sureties and that proper cause for removal to this Court existed, said State Supreme Court did on the 29th day of April, 1910, duly make and entered an order adjudging that the above entitled proceeding, then pending in the said State Court, be, in so far as it affected Parcel No. 733, Section No. 15, removed to this Court and the Clerk of the said State Court was directed under said order to make up the record in the said proceeding for transmission to this Court forthwith. 68

That thereafter, pursuant to the aforesaid order of removal of the said State Court, dated April 29th, 1910, the Clerk of the said State, as directed, did make up the record in the said proceeding for transmission to this Court and the said record was duly transmitted to this Court and is now on file in the office of the Clerk of this Court. The above named claimant desires to file his claim with three Commissioners of Appraisal, to be appointed by this Court, pursuant to the aforesaid State Statute 69

70 and Acts amendatory thereof and supplemental thereto, and desires to offer evidence and be heard upon his said claim in the above entitled proceeding in this Court.

The said claimant has requested William Mc-Mutrie Speer, the special counsel of the City of New York, having charge of the above entitled proceeding, to appear with him before a Judge of this Court and to ask for the appointment of Commissioners of Appraisal, but the said William Mc-Mutrie Speer has failed to do so and the claimant is therefore compelled to make this motion.

71 No previous application for the appointment of Commissioners of Appraisal in the above entitled proceeding pending in this Court has been made to any other Court or Judge, except that three Commissioners of Appraisal were appointed in the said State Court as above herein set forth.

Wherefore the said claimant requests that three Commissioners of Appraisal be appointed by this Court, with all of the powers and all of the duties prescribed in Chapter 724 of the Laws of 1905 of the State of New York for Commissioners of Appraisal, and that the said claimant may have such other, further and additional relief as to this Court may seem just and proper.

72

EDWARD A. ALEXANDER.

Sworn to before me this 10th {
day of October, 1910. }

EDWIN HORWITZ,
Commissioners of Deeds,
New York City.

Filed, November 30, 1910.

**Notice of Motion to Remand Pro- 73
ceeding to State Court.**

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Application of JOHN A. BEN-
SEL, CHARLES N. CHADWICK and
CHARLES A. SHAW, constitut-
ing the Board of Water Supply
of the City of New York, to ac-
quire real estate for and on be-
half of the City of New York,
under Chapter 724 of the Laws
of 1905 and the Acts amendatory
thereof, in the town of
Hurley, Ulster County, New
York, for the purpose of pro-
viding an additional supply of
pure and wholesome water for
the use of the City of New
York,

74

Ashokan
Reservoir,
Section No. 15,
Parcel No. 733,

WILLIAM SAGE, JR.,
Claimant,
against

THE CITY OF NEW YORK,
Petitioner.

75

Sir:

Please take notice that upon the affidavit of Louis
C. White, verified the 28th day of October, 1910,
and heretofore served upon you, and upon all the
proceedings heretofore had herein in this Court,

- 76** and upon all of the proceedings heretofore had in the above entitled proceeding in the Supreme Court of the State of New York, Ulster County, and upon the petition of William Sage, Jr., verified the 20th day of April, 1910, the order of Mr. Justice Betts, a Justice of the Supreme Court for the State of New York, dated the 29th day of April, 1910, the affidavit of Edward A. Alexander, verified the 10th day of October, 1910, accompanying the notice of motion dated October 10, 1910, returnable the 21st day of October, 1910, praying for the appointment of Commissioners of Appraisal by the Circuit Court of the United States of America, the undersigned will move this Court at a stated Term thereof to be held in room 124 in that part of the Court for the Hearing of Motions in the Court House of this Court in the Post Office Building in the Borough of Manhattan, City, County and State of New York, in the Southern District of New York, on the 4th day of November, 1910, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order remanding the above entitled proceeding to the Supreme Court of the State of New York for trial and final disposition, and for such other, further and additional relief as to the Court may seem just and proper.

77 Dated, New York, October 29th, 1910.

Yours, etc.,

ARCHIBALD R. WATSON,
Corporation Counsel of the
City of New York,
Office and Post Office Address,
Hall of Records,
Borough of Manhattan,
New York City.

78 To

EDWARD A. ALEXANDER, ESQ.,
Attorney for Claimant,
No. 165 Broadway,
New York City,
Filed Nov. 30, 1910.

**Affidavit of Louis C. White in Support 79
of Motion to Remand.**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Application of JOHN A. BENSEL, CHARLES N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York under Chapter 724 of the Laws of 1905 and the Acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

80

Ashokan
Reservoir,
Section No. 15,
Parcel 733.

81

WILLIAM SAGE, JR.,
Claimant,

against

THE CITY OF NEW YORK,
Petitioner.

82 State of New York, }
County of New York, } ss.:

Louis C. White, being duly sworn, deposes and says:

That he is Special Counsel in the office of the Corporation Counsel of the City of New York; that he is familiar with the records in the office of the said Corporation Counsel relating to a proceeding commonly known as Ashokan Reservoir, Section No. 15; that the following statements are based upon written, printed and typewritten records in the office of the said Corporation Counsel:

83

I. In 1905 the City of New York secured legislation from the State of New York to provide for the construction of a reservoir in Ulster County, known as the Ashokan Reservoir, and of an aqueduct connecting this reservoir with New York City. This legislation is known as Chapter 724 of the Laws of 1905, State of New York, and the Acts amendatory thereof.

84

II. Pursuant to this authority, there were appointed from time to time by the Supreme Court, Commissions of Appraisal to determine the just and equitable compensation to be made by the City of New York to the owners of or persons interested in the real estate sought to be acquired by said proceedings. The statutes above referred to are made part of this affidavit for a more full explanation of the process provided by the State of New York for the taking of property for the Ashokan Reservoir.

III. Under the authority of this Act, the Board of Water Supply prepared and the Board of Estimate and Apportionment of the City of New York approved and filed on and prior to February 28th, 1909, a certain map, which, among other parcels,

included Parcel 733, situated in the Town of Hurley, County of Ulster, State of New York. That thereupon public notice of motion was given by advertisement and otherwise, as prescribed by the laws of the State of New York, that an application would be made to the Supreme Court on May 22nd, 1909, for the appointment of Commisisoners of Appraisal in the proceeding known as Ashokan Reservoir, Section No. 15, which includes Parcel 733. That on May 22nd, 1909, said application was granted and George E. Weller, of No. 49 Cedar Street, New York City; Fred H. Parker, of Esopus, Ulster County, New York, and George W. Batten, of Lockport, Niagara County, New York, were duly appointed by the Supreme Court of the State of New York Commissioners of Appraisal in this proceeding, and that said Commissioners filed their oaths of office on May 27th and 28th, 1909, at which time, pursuant to the terms of said Act, the City of New York became vested with the title to Parcel 733.

85

86

IV. That the record title to Parcel 733 had been conveyed on August 3rd, 1907, after the beginning of this proceeding by one William Saxe, a resident of Ulster County, New York, to one Frank Burhans, a resident and citizen of Ulster County, New York, said deed being recorded in the office of the Clerk of the County of Ulster, New York, in Liber 405 of Conveyances, page 201.

87

V. That the said Frank Burhans and wife conveyed the premises known as Parcel 733, Ashokan Reservoir, Section 15, to Solomon T. DeLee by deed that was recorded in the office of the Clerk of the County of Ulster, State of New York, on the 24th day of August, 1908, in Liber 413 of Conveyances, page 204. That thereafter the said Solomon T. DeLee conveyed the premises known as Parcel 733,

88 Ashokan Reservoir, Section 15, to William Sage, Jr., by deed dated May 17, 1909, said deed being recorded in the office of the Clerk of the County of Ulster, State of New York, on the 20th day of May, 1909, in Liber 419 of Conveyances, page 414.

Your deponent further alleges upon information and belief, the source of his information being the proceedings of a legislative investigating committee of the State of New York, proceedings before the Commissioners of Appraisal in Kingston and conversation with the parties interested, that a group of speculators, called in Kingston "The Syndicate," purchased in person or through dummies many farms and properties in the Ashokan Reservoir District and among others this Parcel 733, and sought to obtain a speculative profit therefrom by adding in the additional element of "reservoir adaptability." In the proceedings before the Commissioners, evidence on this theory was excluded. Appeals were taken to the Appellate Division and the Court of Appeals of the State of New York, which decided adversely to the speculators' contention and your deponent is informed that an appeal has been taken from that decision of the Court of Appeals to the United States Supreme Court.

89 That after an adverse decision in the State courts the Court of Appeals affirming May 11, 1909, this parcel 733 was conveyed to a resident of New Jersey, May 17, 1909, after the proceedings for condemnation and appraisal had been begun and that thereafter said resident of New Jersey sought the original jurisdiction of the United States Circuit Court, and after jurisdiction of the State Courts had been had.

90 Deponent further alleges his specific knowledge and cites the record for further proof thereof that the deed from Solomon T. DeLee to William Sage, Jr., claimant, herein, was neither executed nor re-

corded until several weeks after the instituting of proceedings by the City of New York pursuant to the law to acquire this property, and that prior thereto and before the institution of said proceedings said Parcel 733 was owned by citizens and residents of the State of New York. 91

Wherefore your deponent prays that this Parcel 733 over which the State of New York had already acquired jurisdiction be remanded to the Commission duly appointed by the Supreme Court of the State of New York to appraise the same, and that this application to the Circuit Court of the United States for the Southern District of New York to take jurisdiction and institute a proceeding of its own be dismissed with costs. 92

LOUIS C. WHITE.

Sworn to before me this 28th)
day of October, 1910. }

WALTER C. SHEPPARD,
Notary Public,
New York Co.

Filed, Nov. 30, 1910.

94 Decision of Judge Noyes Upon Motions to Remand and to Appoint Commissioners of Appraisal.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

95 The Application of JOHN A. BENSEL, *et al.*, constituting the Board of Water Supply, William Sage, Jr.,

Claimant.

Memorandum of Decisions upon Motions.

NOYES, Circuit Judge:

I.

96

The motion to remand.

I have reached the conclusion that the proceedings here cannot be said to have been commenced so as to create a controversy between the owner of the land and the municipal corporation, until the petition for the appointment of commissioners of appraisal was filed in the State Court. The prior filing of maps and publication of notices indicated only an intention to commence proceedings which might not have been carried out.

The claimant was the owner of the land in question at the time of the commencement of the proceedings, and, as a citizen of another state, had the right to remove them to this Court. There is nothing in the record from which fraud or collusion on his part can be found.

97

The motion to remand must be denied.

II.

The motion for the appointment of Commissioners of Appraisal.

98

I am of the opinion that the removal of the proceeding to this Court carried with it all the orders of the State Court including the order appointing commissioners of appraisal. Consequently, while this order remains in force, there are commissioners acting in this matter and no ground exists for the appointment of new ones. The motion is not for the removal of commissioners already appointed.

The motion for the appointment of commissioners of appraisal is denied.

Filed, November 30th, 1910.

99

100

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT—NEW YORK COUNTY.

In the Matter

of

101

The Application of JOHN A. BENSEL, CHAS. N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of The City of New York, to acquire real estate for and on behalf of the City of New York, under Chapter 724 of the Laws of 1905, and the Acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of The City of New York.

Ashokon
Reservoir,
Section 15,
Parcel 733.

WILLIAM SAGE, JR.,
Claimant,

102

against

THE CITY OF NEW YORK,
Petitioner.

New York City, New York,
Feb. 3rd, 1911.

The Commission met pursuant to an order of the United States Circuit Court removing these

proceedings to said Court, at Room 700, 7 Cedar Street, Borough of Manhattan, City of New York, at 2 P. M. 103

Present—Hon. GEORGE E. WELLER, Chairman,
 Hon. FRED H. PARKER,
 Hon. GEORGE W. BATTEN,
 Commissioners of Appraisal.

APPEARANCES:

ARTHUR S. BARNES, Esq., for the Corporation Counsel of the City of New York.
 EDWARD A. ALEXANDER, Esq., for Claimant, Wm. Gage, Jr., *in re* Parcel No. 733. 104

WILLIAM SAGE, JR., Claimant.

Mr. Alexander: I offer in evidence certified copy of order of removal of this claim of William Sage, Jr., against the City of New York, known as Parcel No. 733, of Section 15, Ashokan Reservoir; and also certified copy of order from the Circuit Court of the United States for the Southern District of New York denying the motion to remand this case of William Sage, Jr., Parcel 733, Ashokan Reservoir, Section 15, back to the New York State Courts. 105

(Same received and marked Claimant's Exhibit "A", February 3rd, 1911.)

Mr. Alexander: I offer in evidence deed dated May 17th, 1909, from Solomon T. DeLee, party of the first part, to William Sage, Jr., of Orange, Essex County, New Jersey, party of the second part.

(Received and marked Claimant's Exhibit "C", February 3rd, 1911.)

Mr. Alexander: I offer in evidence deed dated August 24th, 1908, from Frank Bur-

106

hans and M. Celia Burhans, his wife, to Solomon T. DeLee, conveying the same property as that mentioned in the previous deed.

(Same received and marked Claimant's Exhibit "C", February 3rd, 1911.)

Mr. Alexander: I offer in evidence deed dated August 3rd, 1907, from William Sage, of the Town of Hurley, Ulster County, New York, to Frank Burns, conveying the same property as that described in the two previous deeds.

(Received and marked Claimant's Exhibit "D", February 3rd, 1911.)

107

Mr. Alexander: I offer in evidence the statement from the record of the office of the Clerk of Ulster County conveying the same property from John D. L. Montanye, acting executor, etc., of John B. Lewis, deceased, and Aletta Lewis, widow of John B. Lewis, to William Saxe, dated April 1st, 1866, recorded May 19th, 1866, in deed book 137, page 158, conveying practically the same property.

I also offer in evidence from William Saxe and Catherine, his wife, to William Moor, warranty deed, dated April 12th, 1883, recorded May 28th, 1883, in deed book 244, page 212.

108

(Received and marked Claimant's Exhibit "E", February 3rd, 1911.)

WILLIAM SAGE, JR., the claimant, having been first duly sworn by the Chairman of the Commission, testified as follows in regard to Parcel No. 733: 109

Direct-examination—By Mr. Alexander:

Q. What is your full name?

A. William Sage.

Q. Mr. Sage, where do you live?

A. Orange, N. J.

Q. How long have you lived there?

A. Six years.

Q. You live there with your wife and family?

A. Yes.

Q. And you did live there at the time you purchased the property which has been described in the deeds? 110

A. Yes.

Q. After you became the owner of that property the City of New York took title?

A. Yes.

Q. At that time you lived in Orange?

A. Yes.

Q. You are a citizen?

A. Yes.

Q. Citizen of the United States?

A. Yes.

Q. You are now making a claim against the City of New York in this proceeding for the fair, just and equitable value of the property which the City of New York has taken from you? 111

A. Yes.

Q. And for fair and equitable compensation for said property?

A. Yes.

CHARLES N. CHADWICK, one of the Commissioners of the Board of Water Supply, called as a wit-

- 112 ness on behalf of the claimant, and having been first duly sworn by the Chairman of the Commission, testified as follows in regard to Parcel No. 733:

Direct-examination—By Mr. Alexander:

Q. What is your full name?

A. Charles N. Chadwick.

Q. Mr. Chadwick, where do you reside?

A. No. 692 Willoughby Avenue, Brooklyn.

Q. And you are one of the Commissioners of the Board of Water Supply of the City of New York?

A. I am.

Q. How long have you been a Commissioner?

113 A. Since June 9th, 1905.

Q. When that Board was first appointed?

A. Yes.

Q. And you were appointed by Mayor McClellan?

A. Yes.

Q. And you are still one of the Commissioners of the Board of Water Supply?

A. Yes.

Q. At the time you became connected with the Board of Water Supply what did your particular duties consist generally of?

A. Well.

114 Q. Outside routine? You paid special attention to the acquiring of land—to a certain extent?

A. Yes.

Q. Well, will you please describe to the Commissioners to what extent?

A. So far as purchasing property by agreement was concerned, I had something to do with that, but everything was subject to the approval of the Commissioner of the Board of Water Supply; also the approval of the Board of Estimate and Apportionment.

Q. Now, did you contemplate entering into a study of the conditions for an additional supply of water for the City of New York? 115

A. Yes.

Q. And did you make a study of the conditions of the City of New York for an additional water supply prior to the time that you were appointed in June, 1905?

A. I was interested in that for some years.

Q. How many?

A. I think I took that up in 1897.

Q. In making a study of that, did you come to the conclusion that the City of New York was badly in need of additional water supply? 116

A. I did.

Q. And had been in need of additional water for some time?

A. More particularly Brooklyn than Manhattan; at that time the City of Brooklyn was separate from the City of New York, and my interest was particularly for the City of Brooklyn.

Q. Did you form any opinion as to how many million gallons of water a day the City of New York would need?

A. Not at that time.

Q. Did you since that time, in after years, as a Commissioner?

A. I did. 117

Q. What conclusion did you come to as a result of your study?

A. The report that we made to the Board was that the consumption of water at that time by the City of New York was about 550,000,000 gallons per day, and the Board of Water Supply of the City of New York wished plans approved so that it might add to this Croton supply water from the Catskill mountains.

Q. I thought so. You came to that conclusion after a careful study of the situation?

118 A. Yes.

Q. Then it was one of your duties as a Commissioner to investigate what would be the cheapest and most available source or place from which to furnish this additional necessary supply?

A. Yes.

Q. After carefully investigating that you came to the conclusion that the best, cheapest and most available source of supply under all conditions was the Ashokan Reservoir and the watershed of Esopus?

A. Yes.

119 Q. Can you mention from your study of the subject some of the advantages of the Ashokan Reservoir site over others that you investigated?

A. We determined upon the Catskill watershed by the process of elimination. There were other watersheds under consideration, and there were reasons attached to each why they were the most available.

Q. Now, this Catskill watershed, particularly the Ashokan watershed site, is that approximately 600 feet above sea level?

A. Not the site, or the top of the Reservoir. It is a little less than 600 feet above sea level.

120 Q. And what will be the depth of the Reservoir in its deepest place?

A. I am speaking now entirely from memory. I cannot give you the exact figures, but my recollection is that the deepest point is about 180 feet, perhaps a little more. I forget the exact figures. I could give them to you. It varies in different parts.

Q. And the whole pound then is at an elevation anywheres from 420 to 620 feet above sea level?

A. Not the pound. By the pound, you mean the ground, do you not?

Q. Yes.

A. My recollection is that the elevation would be approximately 580 feet; the lowest point is about 180 feet deep. I would like to verify those figures. I can only state to the best of my recollection. The lowest point would be about 180 feet and the average depth about 185 feet. The exact figures could be easily obtained. 121

Q. Well, one of the advantages of the Ashokan Reservoir site is, is it not, that the site is at a considerable elevation above sea level, thus enabling the water to flow down by force of gravity into the high buildings in the City of New York?

A. Yes.

Q. The Reservoir site which was impounded being at an elevation out of which water could flow by force of gravity to the height of the buildings in the City of New York, would save a charge or considerable expense where it was necessary to pump it, would it not? 122

A. To a certain extent—in substituting gravity for a pump.

Q. You took into consideration in this Reservoir site the fact that the water could flow by force of gravity to a greater height than the buildings in New York?

A. We did take into consideration the fact that water would be delivered at an elevation, but what that is it is hard to determine. 123

Q. You do not know the exact figures?

A. No, I could not give you the exact figures.

Q. After the Reservoir has been constructed and the dam built at the site where you are now constructing it, and the water of the Esopus Creek is made to flow into this site, and after the aqueduct has been completed, and the water runs into all these buildings in the City of New York and other places in this neighborhood where it should run it will be a source of considerable profit to the City of New York, will it not?

124 A. I should think so.

Q. And you not very long since made a speech before a public body, did you not?

A. I did.

Q. In the course of which you stated it is expected that the water rents to be paid by the inhabitants of the City of New York within the next ten years, from the time the water begins to run from this Reservoir site would be sufficient to pay for the entire property and thereafter the City of New York would be deriving a profit of \$10,000,000 per year, did you not?

A. Well, I based that on several hypothetical statements.

125 Q. Well, the hypothesis upon which you based that statement was correct, was it not?

A. Substantially, I made such a statement.

Q. The statement which you made, of course, was correct? A. I believe so.

Q. The City will derive a net profit, in your opinion, from this water from \$10,000,000 to \$11,000,000?

A. That depends entirely upon whether or not the City follows the lines I laid down.

Q. Will you please explain to the Commission what those lines were that you laid down?

A. That was based on the sale of water at \$65.00 per million gallons.

126 Q. What is water now selling for in the City of New York—for a million gallons?

A. I do not know exactly. The figures that I had at the time—as I recall it—were about \$1.33 per million gallons, for the metered rate, not for frontage; that is my recollection, from the figures that were given to me.

Q. That is the present selling price for water when metered?

A. These are figures that I obtained at the time.

Q. Then every inhabitant of the City of New York where the water is metered by the City pays to-day at the rate of \$133. per million gallons? 127

A. Those were the figures that I had at the time I made that statement.

Q. From what source did you obtain those figures?

A. I think from the Commissioner of the Board of Water Supply, Gas & Electricity and the Cassidy Commission.

Q. Who was the Commissioner?

A. John H. O'Brien, I think, was the Commissioner.

Q. In the performance of your duties as Commissioner, and from the information submitted to you as Commissioner of the Board of Water Supply of the City of New York, have you ascertained the number of acres of land in the Ashokan Reservoir, which the City of New York has now taken. 128

A. My recollection is that we took about 16,000 acres, all told.

Q. Does that include the thousand foot area?

A. That includes everything. What was taken for the Reservoir itself was something less than that, perhaps ten or twelve thousand acres. I do not remember.

Q. Most of this land has already been acquired, has it not? 129

A. I do not know, that is outside of my knowledge.

Q. You do not keep track of that?

A. No, that is entirely outside of my knowledge. I know what everybody knows, but nothing more.

Q. Out of the fifteen thousand acres which the City must acquire to obtain this site, how much has the City of New York purchased at private sale?

A. I think a very small portion.

Q. More than 100 acres?

130

A. I cannot tell.

Q. All that were taken you purchased, did you not?

A. They passed through my hands. I did not purchase them, personally.

Q. You knew about it?

A. I knew, yes.

Q. Will you please submit to me prior to the next hearing the exact number of acres taken?

A. You mean by permission?

Q. Yes.

A. Yes.

131

Q. In investigating the value, availability, and adaptability of this Ashokan Reservoir site you investigated the quality of the water, did you not, contained in the Esopus Creek, which runs into it?

A. Yes.

Q. Did you find the water contained in this creek to be exceptionally good water for drinking and sanitary purposes?

A. We did.

Q. It was a very soft water, was it not?

A. So I understand.

Q. Contains comparatively slight mineral water?

A. Very good water.

132

Q. And as a matter of fact the Catskill water is known throughout the State to be exceptionally pure?

A. I believe so.

Q. And large quantities is bottled?

A. I do not know.

Q. You have heard of the Crystal Spring water?

A. I have heard the name.

Q. Now, Commissioner, in selecting the Ashokan Reservoir site as the cheapest and most available site to construct a reservoir and aqueduct to furnish an additional supply of 500 million gallons a day to inhabitants of New York City, you naturally took into consideration, did you not, that by

taking this site in preference to others, the City would save a certain amount of money? 133

A. I do not think it was looked at from that point of view.

Q. The first consideration was the quality of water?

A. Perhaps.

Q. Now, in order to refresh your recollection, I desire to read to you from the Second Annual Report of the State Water Supply Commission of New York for the year ending February 1st, 1907—the bottom of page 77 and part of 78: “The question of providing a sufficient supply of pure and wholesome water to meet the needs of the growing City of New York has been for many years a subject of grave concern. The report of John B. Freeman, made to Bird S. Coler, Comptroller of the City of New York, as early as March 23rd, 1900; the agreement made with the Department of Water Supply, Gas and Electricity on December 16th, 1902, organizing the Burr-Freeman Commission and instructing it among other things, to ascertain and report on ‘the future sources of supply for the city, which shall be most available from the point of view of cost and quality of water, to meet the probable future conditions of the city, with the estimated cost of each, and probable yield of water from each and the length of time required to complete each, with general plans and specifications’;” and then they go on to discuss other matters. Now, was it not an important consideration that you obtain the cheapest sources of supply that you could, providing that the water was suitable for your purposes? 134

135

A. It was a consideration and an important consideration, but not the only consideration.

Q. And in selecting this site, you took into consideration that by selecting it in preference to any

136 other, if not all others, that were submitted, the City would save a great amount of water?

A. I think I have given you the reason for the selection of the Catskill watershed—the process of elimination cutting out other watersheds.

Q. Now, I want to find out, after your recollection has been refreshed, if many of the other watersheds were not eliminated on account of the cost?

A. I do not recall that any question ever came up in that form.

Q. I did not put it in that form. I asked to have it stated if any of the other watersheds were not eliminated on account of the cost?

137 A. The cost was an important consideration, but not the only consideration.

Q. The selecting of this site was a very grave consideration, was it not?

A. Wherever you can save money in any way it is advisable to do so.

Q. You were directed to save it in this instance?

A. You are laying the emphasis entirely upon the saving of money and the emphasis should be upon getting water.

Q. So, regardless of how much a reservoir would cost, you would have taken it, so long as you could have obtained five hundred million gallons of water a day of the quality you desired?

138 A. I do not admit that regardless of cost we would have taken the site, as I have stated the cost was an important consideration.

Q. Did you estimate how much you would save by taking this site to the next nearest available site?

A. I do not recall the figures. There were figures submitted to the Commissioner, which is a matter of record. I assume our engineer took those figures into consideration with other facts.

Mr. Alexander: I offer in evidence pages 72 to 90 of the Second Annual Report of the New York State Water Supply Commission of 1907. 139

[Printed as Appendix I.]

Q. I call your attention, Commissioner, to a report of the Board of Water Supply, of which Board you were a member at the time this report was made to the Hon. George B. McClellan, Mayor, dated April 9, 1906, submitted with the following letter:

Board of Water Supply, City of New York,
April 9, 1906.

299 Broadway, New York City,
April 9th, 1906. 140

Hon. George B. McClellan,
Mayor, Executive Chamber,
City Hall, New York.

Sir:—

It will be the policy of the Board of Water Supply to report from time to time to Your Honor the condition and progress of work as it develops.

In accordance with that policy, the Board submits the accompanying report.

Respectfully yours,

141

J. EDWARD SIMMONS,
CHARLES N. CHADWICK,
CHARLES A. SHAW,

Commissioners, Board of Water Supply.

And I call your attention to page 36 of a printed copy of this report, and I ask you whether or not you assisted in making up this report?

A. I have looked over all the reports that have gone in from the Board of Water Supply. I do not recollect of any exception.

142 Q. Did you assist in making up this report?

A. I do not know what part of the report you refer to.

Q. I refer to the whole report.

A. Was that in the Engineering Department that you refer to? If so, that was made up in the Engineering Department.

The Chairman: Show him the paper.

Mr. Alexander handed him the report.

A. I saw the report as a whole.

143 Q. Whenever anything was printed or anything made up by your Board and submitted to you did you sign your name without looking at anything annexed to it?

A. I made it a habit to go over things I saw.

Q. So that before signing any of these reports you read them over carefully?

A. I went over all that I ever saw.

Q. If on going through the reports you found anything contained therein which you considered incorrect, or which did not meet with your approval, would you strike it out?

A. I should certainly have it corrected.

Q. And you carefully read over all the reports?

144 A. As carefully as is possible for a man with the business that I have to do. So far as I was able to, I went over all the reports that came to us from the different boards, and so far as we were able to gather they were substantially correct.

Q. I called your attention to page 38 of this report?

A. Yes.

Q. You always looked through the reports that were submitted to your Board by the other departments?

A. Yes, so far as I could.

Q. And after having considered them they became official part of the records by your Board?

A. Yes.

145

Q. And if you considered anything incorrect in them you would not approve of them?

A. No.

Q. That is what I thought. The City has already acquired about all the water it can acquire in the Counties of Westchester and Putnam; is that correct?

A. I should have to take that in connection with the statement which follows.

Q. Now, is it, or is it not, a fact that on April 7, 1906, the City of New York had acquired all the water it could acquire in the Counties of Westchester and Putnam?

146

A. That is a disputed question; from one point of view, yes; from another point of view, no; that was the judgment of our engineering force at that time, as I recall it. That is, they acquired all that was considered available to New York.

Q. Now, in Dutchess County an act of the Legislature has been passed prohibiting the City from taking water; that was correct?

A. I believe so.

Q. In the Counties of Rockland and Orange no supply of much consequence could be obtained without diverting water which eventually runs into New Jersey?

A. That is correct.

147

Q. There is thus left no locality except the Catskill Mountain region without going to an expense which seems prohibitive at the present time, or without doing what is inadvisable for various reasons; here we find a large supply of pure and wholesome water which can be secured with comparatively little injury to any one and at an expense, while great, yet not beyond the power of the City to bear. The expense of going to the Adirondacks would be enormous; the length of an aqueduct to the Catskill Mountain region would be about 100 miles, while one to the Adirondacks would be about

148 200 miles, and when the aqueduct reached the Adirondack Mountain site it would be met with the same objections from the people there that it is met with when it comes to the Catskill Mountain region. There is also a serious constitutional question growing out of the fact that the State has already appropriated large areas in the Adirondacks for a forest preserve.

The taking of water from the upper part of the Hudson River is inadvisable for many reasons, such as the impure condition of the water, the necessity of building filtration plants and compensatory reservoirs to keep up the flow of the river. That was correct, was it not?

149 A. I stated all these facts a while ago, substantially, as you are reading them.

Q. Now, can you describe to the Commission the character of the Ashokan Reservoir site which makes it particularly advantageous for the impounding of water?

A. Do you mean as to its topography?

Q. That is if you can, if you are familiar with the site?

A. Not as an expert, but in a general way I am. The location, from a topographical point of view, is a fine one by reason of the fact that it is only necessary to construct an aqueduct from the Esopus Creek to the Croton watershed and build a dam at the Esopus Creek.

150

Q. In referring to the topography of the country, you mean that the Ashokan Reservoir site is a natural pound, do you not?

A. Practically.

Q. And in that particular section for the purpose of construction work there were within a very short distance from the dam site enormous quantities of blue stone, were there not?

A. I never entered into that, particularly, but I assume that a quantity of blue stone has been taken from there. 151

Q. Is it true, Commissioner, they used the blue stone in their construction work?

A. I saw houses built of it and it is also used on the Old Plank Road.

Q. I mean, they did not have to cut and carry stone from other sources?

A. The dam is built largely of concrete.

Q. But they used some blue stone?

A. I do not know.

Q. Well, you know, pardon me, do you know, that the City of New York has taken title in condemnation proceedings to lands containing large deposits of this blue stone, which is being used by them in their construction work? 152

A. I understand there is some, but I cannot tell you just the quantity, as I never looked into that.

Q. Now, Commissioner, in considering the availability of a watershed necessary to be used for supplying the additional supply of water to the City, is it necessary to inquire whether the watershed was of such a character as to require the least amount of construction work to bring the water into the distributing system?

A. Why, it is an element, but not the primary element. 153

Q. I admit that, but it is an element?

A. It is an element, certainly.

Q. Now, the watershed of the Fishkill Creek fulfilled all conditions, did it not, but the difficulty that the Fishkill waters and those still further north could only be obtained by a very large amount of tunnel construction in bringing the aqueduct through the mountains on the westerly side of the Hudson River?

A. There were a number of conditions that entered into the taking of the Fishkill water; that

154 was recommended, as I remember it, by the Burr-Hering-Freeman Commission.

Q. No, I am reading from the Burr-Hering-Freeman report where they do not recommend it for that reason.

A. I know, I remember, tunneling is very expensive.

Q. Well, now is it correct that the upper watershed of the Esopus Creek lies on the southerly slope of the Catskill Mountains, and that no limestone is found in all its waters, is that so, to your knowledge?

155 A. Not to my personal knowledge, but I understand that its waters are of unusual softness; that is what we expected the Catskill waters to be; the very best quality of pure and wholesome water; the best that we ever had.

Q. Is it not true that at a point called Olive Bridge on the Esopus about thirty miles from Kingston there is the best dam site in any watershed?

A. If we had not thought so, we should not have put the dam there.

Q. I want your approval?

A. Yes, certainly.

156 Q. Sufficient water can be impounded in the Ashokan water site to furnish the inhabitants of the City of New York how many million gallons of water per day—about?

A. About five hundred million gallons of water per day; which means the impounding of the adjacent watersheds, making provisions to deliver two hundred and fifty million gallons into the City daily, taking it from the Esopus watershed.

Q. The storage system which will be built at the dam at Olive Bridge, which you are now doing, has a greater capacity than that sufficient to furnish two hundred and fifty million gallons per day, has it not?

A. It has; it is intended to hold three hundred

million gallons. The Rondout watershed will be delivered to the aqueduct below the dam. 157

Q. Have you any idea, Commissioner, as to how many million gallons per day the Fishkill watershed will yield?

A. I do not recall it now.

Q. Well, if I mention the figures sixty million gallons?

A. I think that is about my recollection of it. I know it was a comparatively small quantity. The City needed five hundred million gallons, or will need it by the time it is ready to deliver.

Q. By the time this work is completed, it will need five hundred million gallons per day? 158

A. I think it will need all of that if the population increases as we think it will. The Wappinger Creek would yield about fifty-two million gallons per day approximately, and the Jansen Kill, which is another reservoir site, would yield about seventeen million gallons a day.

Q. Did you, or did you not, consider it advisable to construct a large number of small reservoirs?

A. We did not, the Burr-Hering-Freeman Commission did.

Q. Do you know, Commissioner, whether other cities along the Hudson outside of New York were in need of water at the time you became Commissioner of the Board? 159

A. I never looked into that particularly.

Q. Well, the City of Kingston has the right to use the water supply?

A. Yes.

Q. Also the City of Yonkers?

A. All in Westchester County.

Q. The whole of Westchester County?

A. That is my recollection, the whole of Westchester County.

Q. Also, the City of Newburg has the right?

A. No.

160 Q. Do you know that there has been a great scarcity of water in certain parts of Westchester County?

A. I do, and a great scarcity of water in the country up in Connecticut; my well and spring all went dry this last year.

Q. Now, the waters which lie on the easterly side of the Hudson River within a distance of 100 miles north are not as good in quality as the Catskill region water?

A. I do not recollect a comparison or an analysis of the water. My recollection is that the Catskill water was considered the best.

161 Q. Have all these other reservoir sites on the easterly side of the Hudson within 100 miles of New York very much of an elevation above sea level?

A. I do not remember the exact elevation; I should have to look that up.

Q. And it is very important, is it not, in connection with furnishing a supply of water to have water come down or flow down into the City from a sufficiently high elevation so that in case of fire there will be sufficient force without pumping it?

A. I do not understand that that is vital, as you get your pressure from the fire engines.

Q. That greatly assists them in it, does it not?

A. It may help.

162 Q. Now, can you state anything with respect to reservoir sites now owned by the City with respect to their elevation?

A. You can get the figures from the Department of Water Supply, as to the elevation of the reservoirs under the control of the City. I have not that in my immediate knowledge.

Q. Wherever the City will furnish water from this source of supply from Kingston to the inhabitants of Westchester County, it will charge for the water, will it not?

A. That is provided for in the act itself.

163

Q. Well, it expects to sell the water?

A. Yes, I mean the conditions and provisions are provided for within the act, as I remember it.

Q. You never considered the availability and adaptability of this particular reservoir site for impounding water for power and electrical purposes, did you?

A. We have never taken that up, no.

Q. You did not think it a practicable proposition?

A. I do not know that I thought it impracticable, although I would not say. I might change my opinion.

164

Q. Do you know whether or not there are any engineers' reports on this proposition?

A. I do not think there are any reports on that. I do not recall any.

Q. Did you know that prior to the time that the City of New York investigated the Ashokan Reservoir site as the probable source of a water supply for the City that Ramapo Co. had acquired an option of a considerable part

A. I understand that Ramapo had acquired an option.

Q. The Ramapo Co. has now filed a claim against the City of New York, has it not?

A. I believe so.

165

Q. Do you know of that claim?

A. I do not.

Q. Who has charge of that?

A. I do not know.

Q. The Corporation Counsel.

A. The Corporation Counsel's office.

No further witnesses being present, no other testimony being read, both sides having exhausted their witnesses for the day, Commission adjourned to the 13th February, 1911.

166

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT—NEW YORK COUNTY.

In the Matter
of

167

The Application and petition of
JOHN A. BENSEL, CHARLES N.
CHADWICK and CHARLES A.
SHAW, constituting the Board
of Water Supply of the City of
New York, to acquire Real
Estate for and on behalf of the
City of New York, under
Chapter 724 of the Laws of
1905, and the Acts amendatory
thereof, in the Town of Hurley,
County of Ulster, New York,
for the purpose of providing
an additional supply of pure
and wholesome water for the
use of the City of New York.

Ashokan
Reservoir,
Section 15,
Parcel No. 733.

168

WILLIAM SAGE, JR.,
Claimant.

vs.

THE CITY OF NEW YORK,
Petitioner.

New York City, N. Y., Feb. 15, 1911.

The Commission convened at 11 A. M., pursuant
to adjournment, at Room 700—#47 Cedar St., New
York City.

Present—Hon. GEORGE E. WELLER, Chairman.

169

Hon. FRED H. PARKER,
Hon. GEORGE W. BATTEN,
Commissioners of Appraisal.

APPEARANCES:

ARTHUR S. BARNES, Esq., for the Corporation Counsel of the City of New York.
EDWARD A. ALEXANDER, Esq., for Claimant, William Sage, Jr., *in re* Parcel #733.

J. WALDO SMITH, Chief Engineer, Board of Water Supply, City of New York, being first duly sworn by the Chairman of the Commission, testifies as follows in regard to Parcel #733:

170

By Mr. Alexander:

Q. Where do you reside, Mr. Smith?

A. New York City, Borough of Manhattan.

Q. By profession you are a civil engineer?

A. I am.

Q. You have made a specialty of water supply, have you not, for a great many years?

A. Water supply and water power.

Q. You have been engaged in supervising various works of construction for the supply of water to the municipalities, and also for the impounding of water for power purposes?

171

A. I have.

Q. Can you name some of the companies who have obtained your services?

A. For the power end of it—I was employed at Lawrence, Mass. in connection with water power on the Merrimac River, developed a great many years ago, and later, I went to Holyoke; later I went to New Jersey and was employed by the East Jersey Water Company, from 1890; stayed there until 1903 and was in their employ and that of subsidiary companies and had an important part in the con-

172 struction of the water supply for the City of Newark and Jersey City, capacity of 50 million gallons a day; that is, the Company had a contract for designing, constructing, operating and maintaining the works to be later turned over to the City at the price agreed.

Q. They paid for the water or bought it?

A. That is what I mean, yes; they had the option of buying it. In addition to that, the engineer of the Passaic and Aquackanock Water Companies distributing the supply to the consumer. Later I left there and was appointed engineer of the Aqueduct Commission, in 1903, and had charge of the
173 construction of the new Croton Dam and other works and other constructions in the Croton, generally. In 1905, I was appointed to my present position, Chief Engineer of the Board of Water Supply.

Mr. Alexander: I am just bringing this out to show Mr. Smith's knowledge of the matter.

Q. In some of these instances, your inspection of the works took place before the land was acquired, did it not?

A. Yes, in some cases.

Q. In starting in to obtain the source of water supply, the first thing that an engineer does, is it
174 not, is to figure out what will be the best, cheapest and most available supply for the purpose?

A. Yes. That is a very important consideration.

Q. And after figuring that out, comes an estimate of the cost of construction?

A. Yes.

Q. And in estimating—

A. The cost of constructing would come under that question.

Q. Then, in order to determine that the engineer must figure out then, the value of the land that will be taken for reservoir and aqueduct purposes, must he not

A. He must make an approximate estimate of that. 175

Q. That is the course of procedure followed in contemplating the acquisition of the reservoir sites and land for the aqueduct in the obtaining of this Catskill supply, was it not?

A. In obtaining this Catskill supply, we first cast around for—to determine the available sources—

Q. I mean after you had determined that?

A. But the Legislature had fixed it so there was not very much left. We studied reports made previously by distinguished engineers and laid out approximate location of the dams, and made estimates of costs and presented report, and that included the cost of construction and other matters to make up— 176

Q. Can you tell me what those estimates of cost were?

A. No, I cannot.

Q. Are they contained in the official report?

A. Yes.

Q. Now, Mr. Smith, the estimated cost of the entire works, completed, to furnish to the City of New York, 500 million gallons, per day, from the Catskill supply, is how much?

A. Including the delivery by the pressure tunnel to the various boroughs? 177

A. Yes. A \$177,000,000.

Q. The original estimate?

A. In the original estimate of \$162,000,000, to deliver water to the Boroughs of Queens, Bronx and Manhattan, the Boroughs of Brooklyn and Richmond were not included, but were distinctly excepted. At a later date, the supply to all the boroughs was taken up and a new plan prepared, which was estimated to cost \$25,000,000, or \$15,000,000 additional to the original estimate, \$10,-

178 000,000 having been included for a supply of 100 million gallons to the Borough of Brooklyn and 20 million gallons to the Borough of Richmnd.

Q. That construction work is solely for the delivery of this Catskill water?

A. Yes.

Q. It will only be Catskill water—that is all you contemplate now?

A. Yes.

Q. Unless subsequently the City deems it expedient to pump—

179 A. There is a provision that an aqueduct might be laid down the Croton Valley from some of the upper reservoirs that are high enough to deliver by gravity.

Q. You expect then to deliver, through this pressure tunnel, 500 million gallons a day of Catskill water?

A. That is right.

Q. You could have crowded more through—can always get more through.

Q. You didn't have that object in view when you constructed this system?

A. No, we did not.

Q. What are the main parts of the entire reservoir system that you are now constructing in order to bring this Catskill water to the City?

180 A. You mean main parts of the reservoir system?

Q. Yes?

A. The Ashokan Reservoir is the only storage reservoir now being constructed. Besides that, there is an intermediate reservoir to be filled by the aqueduct at Kensico and furnish a storage there to be available on the east side of the river, and a reasonable distance from the City of New York, and furnish water in case it becomes necessary to shut down the aqueduct for repairs.

Q. Is this Kensico Reservoir going to be a storage reservoir also?

A. It might be called a storage reservoir, but it is supplied in the main from the aqueduct. 181

Q. A storage reservoir in my mind is one filled by an actual storage?

A. But this Kensico Reservoir won't be filled by natural drainage—only to a limited extent. The Bronx and Byron River furnish about 25 million gallons a day.

Q. They constitute a part of the Kensico system, don't they?

A. Yes, and also the Hillview Reservoir, which is to take care of the inequalities and draft of the City, which is, of course, different at different hours of the day, and different days of the week, different weeks of the month, and different months of the year. 182

Q. Thus the construction work of three reservoirs will be all the construction work, so far as reservoirs are concerned?

A. At the present time, yes.

Q. Subsequently you intend to take the water from some other channel?

A. There is one exception to that; there is a small distributing reservoir planned for Staten Island, to be built.

Q. In connection with this system?

A. In connection with this system.

Q. Didn't the City purchase two water companies in Staten Island a short time ago? 183

A. They did.

Q. When you say that the water to fill this Kensico reservoir is coming from the aqueduct, you mean by that that the water originally comes from the Ashokan reservoir, through the aqueduct into the Kensico, and will be retained in the Kensico for the purposes you gave?

A. That is correct.

Q. Out of the entire estimate of 162 million dollars, which is contemplated to expend to bring the

184 Catskill water to the City line, what will be the actually amount of the construction work to complete the Ashokan reservoir, disregarding land values and damages?

A. That is 125 million ?

Q. No, 162 million; it is 152 million dollars down to the City line?

A. The amount of the contracts of the Ashokan reservoir, for the construction of the dams and dikes and highways and other construction, will be, approximately, about 14 million dollars. The contracts actually let, I can give those figures of but a few.

185 Q. What was the estimated cost?

A. The estimated cost, including all riparian rights?

Q. Exclusive of riparian rights?

A. I have not that—apparently about 14 million dollars.

Q. Fourteen million dollars expended in doing all the construction work on the Ashokan reservoir site, will complete the Ashokan reservoir, will it not?

A. Yes.

Q. I mean exclusive of the value of the land?

A. Exclusive of the value of the land; exclusive of the land, riparian damages and everything.

186 Q. That 14 million dollars simply includes the construction work?

A. Just the construction work.

Q. What it will cost to build the dams, tanks and everything of that kind?

A. Yes.

Q. That will make the completed reservoir, exclusive of the land and riparian and other damages?

A. Yes.

Q. What is the estimated cost of construction of the aqueduct from the Ashokan reservoir to the City line? 187

Chairman: If you know.

A. The aqueduct to the City line was estimated at 53 million dollars—\$52,772,000.

Witness: Yes.

Chairman: Roughly you called that 53 million?

Witness: Yes.

Q. What was the estimated cost of the Kensico reservoir?

A. The contract has been let there; that is eight million dollars, building that. 188

Q. What was the contract price?

A. The contract for building main dam was approximately eight million dollars.

Q. Will the contract price for completing all the construction work to make the Kensico reservoir complete be eight million dollars?

A. Will be about 13 million dollars.

Q. It will be less 13 million dollars, included land and other damages?

A. I should say it will cost about pretty well, as represented by that contract.

Q. Approximatey, 8 million dollars for construction work? 189

A. Yes.

Q. What is the storage capacity of the Kensico Reservoir, when completed?

A. Approximately 30 billion gallons available.

Q. And of that 30 billion gallons, how much will flow into it from the Byron Pond and Bronx River?

A. I cannot say; the Byron Pond and the Bronx River are capable of supplying about 25 million gallons a day.

190 Q. How many million gallons a day would come from a storage of 30 billion gallons?

A. You cannot increase the supply any by the Kensico Reservoir; that would not increase it any.

Q. Could you figure what part of the storage of the Kensico Reservoir was intended for the storage of the Bronx and Byron, and what part for the Catskill water?

A. I suppose it could be done, but I am not prepared to do it.

Q. You would not undertake to say what part should be contributed to each system?

A. Not to-day.

191 Q. You think you could figure that out and let me have it on paper?

A. I could figure it.

Q. In addition to the Ashokan Reservoir, the Aqueduct and the Kensico Reservoir, there will be a Hillview Reservoir in connection with the Catskill system, will there not?

A. Yes.

Q. What will be the cost of construction of the Hillview Reservoir, exclusive of land values, approximately?

A. The contract price, as I remember it, will be about 3 million dollars; between 3 and 3½ million. I have not looked at that for some time.

192 Q. Is there a filtration bed that the City contemplates to construct as a part of the Catskill system?

A. There was a provision made for filtering the Catskill water.

Q. Which was to be filtered through a filtration bed?

A. Yes.

Q. As I understand it, that was to consist of certain sandy land, part of it?

A. Built up beds filled with sand, 4 feet deep.

Q. There will be considerable work in connection with grading that filtration system? 293

A. Yes.

Q. Was the cost of that filtration system included in the 163 million dollar estimate?

A. It was; that was the entire cost, including land and everything else.

Q. Exclusive of land?

A. I cannot give that.

Q. Out of the original estimate how much was allowed for filtration?

A. 21 million dollars.

Q. Pretty high, isn't it?

A. Yes, that is high.

Q. Would there be much land taken in connection with the construction of this filtration bed? 294

A. Quite a large area.

Q. Can you give us any idea of the area?

A. I would not like to give it. The area has been taken by condemnation.

Q. The value of the land included in this 21 million dollars is an inconsiderable part, isn't it?

A. No, it is not.

Q. Out of 21 millions, \$380,000 is a very inconsiderable part of it?

A. Of this 21 millions, I think there was a liberal amount for land taken, because the area then estimated on was near the Village of Scarsdale and the property was expensive. 295

Q. But the City took the property known as the Cochran Farm, and some adjoining land which was much cheaper than the land originally contemplated?

A. We thought it would be cheaper.

Q. That is why you took it?

A. More for other reasons, when we came to look into details.

Q. Are you using all of that for those filtration beds?

196 A. Nothing will be left over, except such as is necessary for the ducts.

Q. What other parts of the Catskill system are there besides those already mentioned, which include the Ashokan Reservoir, the Aqueduct to the City Line, the Kensico Reservoir, the Hillview Reservoir and the filtration beds and the delivery of water throughout the City to the various boroughs?

A. That is all.

Q. That is included in that 15 million dollars, in addition to the original estimate?

A. Yes.

197 Q. Are the reservoirs to be built in the Rondout Water Shed and the Schoharie, in that estimate?

A. No, because the Rondout and Schoharie, with the Esopus, will be sufficient to furnish five hundred million gallons without the Catskill.

Q. The City is not now engaged in acquiring either the Rondout or Schoharie sources of supply, is it?

A. No proceedings have been commenced in either place at the present time.

Q. The City is now simply engaged in performing all the construction work necessary to obtain the supply from the Ashokan Reservoir?

198 A. The Esopus water shed to be developed by the Ashokan Reservoir, as I have said before this, will furnish about 250 million gallons a day.

Q. That is, the Esopus water shed will furnish about 250 million gallons a day?

A. Yes.

Q. But the reservoir that you are building in the Ashokan Reservoir site will be sufficient to store a part of the waters from the Schoharie water shed?

A. It is planned that part of that water will be brought through a tunnel and stored in that reservoir.

Q. In the development for the Rondout water shed therefore, the water will be sent directly into the aqueduct, will it not? 199

A. Yes.

Q. Was it contemplated to build any reservoir in the Rondout water shed?

A. Yes, if I remember it, there are two shown. (Map contained in the report of the Board of Water Supply of the City of New York to the Board of Estimate and Apportionment, Oct. 9, 1905, referred to.) The plan of Oct. 9, 1905, contemplated constructing two reservoirs on the main Rondout Creek, the Lackawack and Napanock. Also, four small reservoirs on the tributaries of the Rondout, below Napanock, and connecting these by an aqueduct with the main aqueduct line running from the Ashokan Reservoir to the City, in the neighborhood of Stone Ridge. 200

Q. That was the original plan contemplated, was it not, Mr. Smith?

A. Yes.

Q. And you have modified that to a certain extent, have you?

A. No modification up to date.

Q. Do you intend, now, to construct the Lackawack and Napanock reservoirs, as well as the four smaller reservoirs?

A. Yes, so far as we know; when we look into this in detail it is possible some may not be built. But the plan has not been changed to date. 201

Q. You have charge of that personally?

A. Charge of making recommendations.

Q. Now, Mr. Smith, the original plan of Oct. 9, 1905, then, contemplated the construction of the Ashokan Reservoir and these two reservoirs in the Rondout water shed, as well as the four subsidiary reservoirs in connection with the Rondout water shed, and also the construction of the Prattsville Reservoir and the Schoharie?

202 A. It did.

Q. The estimate of 162 million dollars didn't include any construction work in the Catskill water shed?

A. It didn't.

Q. But in the construction work that is everything?

A. The entire cost.

Q. In that estimate nothing was included for the construction of anything in the Catskill water shed?

A. Nothing.

203 Q. If the City of New York, from necessity, should subsequently utilize the Catskill water shed, the waters from the Catskill water shed could be utilized in connection with this system now being constructed, could it not?

A. It could be done, but if the other two water sheds were developed, an aqueduct would be necessary before the water could be taken from any additional water shed, other than the three mentioned, The Esopus, Rondout and Schoharie.

Q. Will the supply of water from the Rondout, Esopus and Schoharie water sheds yield, actual delivery to the City line of the City of New York, over 500 million gallons of water a day?

204 A. The estimate is approximately, 500 million gallons a day, estimated on a very conservative basis; as I figure out, about 511 million gallons.

Commissioner Batten: How much capacity has the Schoharie water shed, estimated at about 149 million gallons a day?

The Witness: You have to go pretty high on the Catskill before you get anything at all.

Mr. Alexander: Did you refer to the Catskill?

The Witness: Yes.

Mr. Alexander: The question was the Schoharie?

The Witness: 136 million gallons.

205

Commissioner Batten: That would be pretty nearly 300 million gallons extra, would it not?

The Witness: No, the Esopus would furnish about 250 million gallons, the Rondout about 125 million gallons and the Schoharie about 136 million gallons.

Q. Mr. Smith, is there any other reservoir site, either in the Esopus or Schoharie, but the Ashokan reservoir site, which would be sufficiently large to store the waters of the Esopus and Schoharie water sheds?

A. I don't know of any.

206

Q. So that, from the waters to be stored in the Ashokan reservoir, when completed, the City of New York will be furnished, up to the City line, with about 386 million gallons per day, 250 million gallons from the Esopus and 136 million gallons from the Schoharie water shed?

A. That is correct, because the Schoharie water is to be brought up and delivered through the Ashokan reservoir.

Q. When the Rondout watershed is fully developed, as contemplated, the City of New York will receive from that source of supply, approximately, 125 million gallons per day?

A. That is correct.

207

Q. Which will flow directly from the reservoir constructed in the water shed, through a branch aqueduct running into the main aqueduct?

A. Joining the main aqueduct at Stone Ridge.

Q. So that the main aqueduct is built sufficiently large to enable it to carry the waters from the three water sheds, the Rondout, Esopus and Schoharie, below Stone Ridge.

A. All the water through.

208 Q. Can you give us the proportionate cost of obtaining the 250 million gallons from the Esopus water shed, in comparison to the cost of obtaining the 136 million gallons from the Schoharie and the 125 million gallons from the Rondout, at Stone Ridge?

A. The estimated cost of the Ashokan reservoir and the Esopus water shed, including all land, riparian rights and damages of every description, the entire expenses, \$29,200,000.

Q. That is for 20,000 million gallons a day?

A. Yes.

209 Q. That includes, Mr. Smith, the \$29,200,000 includes, as Commissioner Parker has suggested, part of the cost of development of the Schoharie—there is a provision for storing some of that water in the Ashokan reservoir?

A. That is what I mean. The Schoharie development, the entire expense, is estimated at \$14,200,000.

Q. But that estimate of \$14,200,000 does not include any portion of the cost of the \$29,200,000, does it?

A. It doesn't.

Q. That must be added to it, in order to—(No answer.)

210 Q. What is the estimated cost of development of the Rondout?

A. The Rondout is estimated at \$14,500,000.

Q. How much storage is contemplated for the waters of the Schoharie?

A. I cannot tell you that, Mr. Alexander, I have not the figures.

Q. Do you think that could be figured out?

A. I think, perhaps, there is a figure somewhere. I don't remember those figures; don't think they have been made with any exactness—except sufficient storage to furnish that quantity of water, 136 million gallons a day.

Q. When completed, you have already testified, 211
that the storage capacity of the Ashokan reservoir
will be, approximately, 127 billion gallons?

A. That is correct.

Q. What is the complete storage necessary for
the water of the Esopus water shed, exclusive of
that of the Schoharie water shed?

A. I could not answer that question.

Q. You contemplate, do you not, to acquire from
the Esopus water shed, 250 million gallons a day?

A. Yes.

Q. From the Schoharie, 136 million gallons per
day?

A. Yes.

Q. So that you get almost double the water from
the Esopus water shed, than you will get from the
Schoharie water shed? 212

A. Nearly.

Q. Would the storage, therefore, of the Schoharie
be, approximately, half?

A. It would not, because there is quite a large
reservoir to be developed in the Schoharie.

Q. What is the storage capacity of that?

A. That I could not answer. The Schoharie
water shed, which we impounded, which we de-
veloped, is 228 square miles, or nearly equal to
the area of the water shed developed in the Esopus,
and for this reason the storage capacity would not
be proportioned to the quality of the water to
be obtained from each, and only a comparatively
small percentage of this Ashokan reservoir will be
devoted to the Schoharie water. 213

Q. Do I understand you correctly, Mr. Smith,
when you say that you intend to develop 228 million
gallons per day in the Schoharie water shed, and
to derive from it only 136 million gallons a day?

A. No, develop 228 square miles, and only expect
to get 136 million gallons from it.

214 Q. So that, for water supply purposed, the Schoharie is not nearly as good as the Esopus?

A. Not so easily developed for delivery to New York City.

Q. Is not as good for any purpose, is it, not only for delivery to New York City, but to any other place?

A. No, I would not say that.

Q. You get less water per day from almost as large an area, do you not?

A. To get approximately the same capacity, or the same capacity per square mile, would require only additional reservoirs.

215 Q. That is, if you wanted to obtain the same supply of water, per square mile, from the Schoharie as you do clear from the Esopus, it would necessitate the construction of additional reservoirs in the Schoharie?

A. It would.

Q. Mr. Smith, you were after 500 billion gallons a day for the City of New York?

A. Yes, sir.

Q. And you proposed to get that water as cheap as you possibly could?

A. That was our business; would not live up to our duty if we didn't do that.

216 Q. Is there any way in which you could figure out the actual cost, per million gallons, delivered to Stone Ridge, from these three water sheds, the Esopus, Schoharie and Rondont, taking all things in consideration?

A. I suppose an estimate could be made.

Q. It is feasible to do that, isn't it, Mr. Smith, if somebody sat down to do it?

A. I think it is feasible.

Q. You have not had occasion to do that?

A. No, not at the present time.

Q. Can you give me the estimated cost of development of the Rondout water supply? 217

A. I gave that to you; this I recollect all right, \$14,500,000.

Q. Adding together all the items that you have so far given, they make a total of about \$128,200,000. Would the balance of 162 million dollars, being about 54 million dollars, be the approximate amount for all land damages, riparian damages, the fee of land taken in all these reservoirs, and the land taken for the aqueduct?

A. I do not understand what you have in that.

Q. Can you state the total estimated amount of construction work, solely, regardless of the value of land, riparian and other damages, in constructing the Ashokan reservoir, the aqueduct to the City line, the Kensico reservoir, the Hillview reservoir, the filtration bed and the Rondout and Schoharie reservoirs? 218

A. I have not those figures in my mind, part of them I have given to you, the rest I don't know at this time.

Q. Can you tell me how much of the 163 million dollars it was estimated would be allowed for land and land damages, riparian and other damages?

A. No, I have not that figure.

Q. Is there any official report from which that figure can be obtained? 219

A. Not to my knowledge.

Q. Any estimate ever made by anybody in the employ of the City, to your knowledge?

A. There was an estimate made in making up this original estimate, but it was made in the very early days, gathered together and put in that report, and everything in existence, to my knowledge and belief, is in that report.

Q. There never was an estimate made, to your knowledge, in developing the Esopus, Schoharie

220 and Rondout water sheds, exclusive of the estimated value of land, land damages and riparian rights and other damages?

A. There was one made originally; we could not have written that report without making such an estimate.

Q. Do you know who made it?

A. I do not.

Q. Know where we could find it?

A. I don't believe it is in existence.

Q. Have you seen such an estimate yourself?

A. Why, I must have seen such an estimate at the time of making up this report.

221 Chairman: You don't recollect where it is now, or who made it?

The Witness: No; gathered it together as the result; got it together at this time.

Q. Do you think Commissioner Chadwick is apt to know about it?

A. He might (referring to record). You see, in this estimate, it is given in some detail, like item No. 14.

Q. Mr. Smith, have your estimates been pretty nearly the contract price, in nearly all cases?

222 A. Why, we sized this thing up about a year ago and allowed that we were going to run very close to the original estimate. In the Ashokan reservoir there is \$6,500,000, which would be various damages, besides the cost of construction, plus 20%, which would amount to nearly another million—which would be \$1,300,000 more.

Q. That would be on the average, for 15,000 acres taken, or about \$520 per acre, including re-location of railroads and riparian damages, would it not?

A. That is correct.

Q. That is correct for the land value in the Ashokan reservoir?

A. It is also an estimate of damages of the Ken-sico reservoir, except that there are included in it some highways and bridges. 223

Q. Is there any estimate there, Mr. Smith, for the land damages for the proposed filtration bed?

A. No.

Q. All land to be taken, to the best recollection that you now have, is estimated at about \$15,000,000?

A. Yes. It is my impression that the 15 million dollars included 20% for contingencies.

Q. Do you know what proportion of the 15 million dollars was estimated for the land to be acquired by the City for the aqueduct? 224

A. No, I do not know that, Mr. Alexander.

Q. Your estimate was way off on that item, was it not, on actual facts?

A. I do not think so; I think we allowed—I think our estimate was probably as close on the land, as it was on the cost of the construction; I really don't know how much the land cost.

Q. Do you know the actual average damage for land awards in the Ashokan?

A. I do not.

Q. Mr. Smith, when you were a commissioner for the Aqueduct Commission of the City of New York, did you ever hear of the Ramapo Company?

A. I have heard of the Ramapo Company for a great many years. 225

Q. Do you know what that company was organized for?

A. Organized on the hope of being able to sell water to the City of New York.

Q. Do you know what the Ramapo Company contemplated doing?

A. I do not know to my own knowledge, only what I have seen in print.

Q. They were organized some time in 1890, weren't they?

226 A. I don't know.

Q. As engineer of the Aqueduct Commission of the City of New York, what were your duties?

A. My duties were to push the construction of what they then had under contract, and hasten the time when the City would have an additional supply from the Croton. I didn't go to the Aqueduct Commission until the end of 1903.

Q. You were not then studying the general water situation, so far as it affected the City of New York and its growing needs for additional supply, or supplies of water?

A. I was not studying it up to that date.

227 Q. That is up to 1903?

A. Yes.

Q. In the course of your studies on this subject, did you run across the Ramapo Water Company?

A. I found evidences that they had options on property in the Esopus water shed.

Q. You also looked into the question as to what that company contemplated doing, did you not?

A. No, we didn't look into that.

Q. There was quite a hubbub in the City of New York at that time, was there?

A. Quite a number of years before; not at this particular time, but sometime previous to this.

228 Q. When you say you discovered evidences of the Ramapo Company having had options on the Esopus water shed—they claim those options still continue, do they not?

A. I have not heard that; they let them lapse.

Q. Do you know whether the Ramapo Company had done any work, in the way of preliminary work, for the construction of water sheds?

A. Nothing visible.

Q. Had any maps been filed by the Ramapo Company?

A. I don't know.

229

Q. If any maps were filed they would be visible?

A. Nothing visible on the ground.

Q. The water which will come through these three water sheds mentioned will also be used by other cities besides New York City, will it not?

A. There is a provision on various statutes giving the right to some of the communities to take water from this aqueduct.

Q. Yonkers has?

A. I don't know.

Q. White Plains?

A. I don't know.

Q. You cannot furnish any more than 500 million gallons per day from this source of supply?

230

A. That is the estimate, 500 million gallons from the Rondout and Schoharie.

Q. And the City of New York will need 500 million gallons a day?

A. That is correct.

Q. So that if there are statutes which provide that other municipalities and communities along the line of the Hudson River may take water from this source of supply which the City of New York is now engaged in developing, there will not be enough water for the demands of the City of New York, is that correct?

A. I would not say it was correct; it is not correct.

231

Q. In what respect?

A. In the first place it depends on whether they ever have such right and ever exercise it, and if so, how much water they take. They cannot take it if New York City will use 500 million gallons, and if the whole system will only issue 500 million gallons, these other municipalities and communities will be greatly left.

232

Commissioner Batten: The supply in New York to-day is about 500 or 550 million gallons a day; in 1890 the then supply of the City was about 100 million gallons a day, and the City built an aqueduct big enough to bring in 300 million gallons, and now, twenty years after, it builds an aqueduct to double that.

Q. As engineer for the Aqueduct Commission of the City of New York, did you have occasion to look into the price at which water was sold in the City of New York?

233

A. I did not.

Q. By the City to its inhabitants?

A. I did not. That is water under the jurisdiction of the Department of Water Supply.

Q. Do you know now the price at which water is sold to the City of New York by the Croton system?

A. I do not know.

Q. The Croton system has been very successful, financially, has it not?

A. I do not know, sir.

Q. All water supplies that you have been connected with have been successful, financially, have they?

234

A. They have not.

Q. Which ones have you been connected with?

A. I tell you, Mr. Alexander, I have never been connected with the financial affairs of any of the companies I served, and that is a question I could not answer.

Q. I show you, Mr. Smith, a copy of the first annual report of the State Water Supply Commission of New York for the year ending February 1, 1906, in the back of which is contained what is entitled

"Abstracts of Reports," the same purporting to be abstracts of reports showing the profits derived in nearly every instance from the sale of water of nearly every city and incorporated village in the City of New York, and will ask you to mention a single one of these, after glancing through these reports, that isn't highly profitable? 235

A. I do not know; this would take a detailed examination to answer that question.

Q. How long has the East Jersey Water Company been in business?

A. Twenty-one or twenty-two years.

Q. It has not operated at a loss during those years, has it? 236

A. I don't know; they have had some pretty hard slaving.

Q. Mr. Smith, did you have anything to do with the construction of the Croton River Reservoir?

A. Croton River?

Q. Yes.

A. I don't know really which one that refers to; don't know of any reservoir by that name.

Q. Do you know—have you ever heard of the Cross River Reservoir?

A. Yes.

Q. Where is that?

A. On a branch of the Croton River, near the Village of Katonah. 237

Q. When was that constructed?

A. In the year—

The Chairman: About?

A. Taken in 1905 and finished so water could be stored sometime in 1907.

Q. What was the character of the land in that reservoir?

A. Farm and woodland.

238 Q. Some swamp, wasn't it?

A. Some swamp around the stream; pretty good land, about like all other land in the Croton.

Q. Do you know the average price per acre for that?

A. I do not.

Mr. Alexander: I offer in evidence the abstracts of reports from the First Annual Report of the State Water Supply Commission of the State of New York, year ending February 1, 1906, from pages 59 to 196, inclusive.

239 Received and marked "Claimant's Exhibit F, February 15, 1911."

No cross-examination.

Adjourned at 1.15; recess until 2 o'clock.

240

UNITED STATES CIRCUIT COURT,

241

SOUTHERN DISTRICT—NEW YORK COUNTY.

In the Matter

of

The Application and Petition of
 JOHN A. BENSEL, CHARLES N.
 CHADWICK and CHARLES A.
 SHAW, constituting the Board
 of Water Supply of the City of
 New York, to acquire real es-
 tate for and on behalf of the
 City of New York, under Chap-
 ter 724 of the Laws of 1905,
 and the Acts amendatory there-
 of, in the Town of Hurley,
 County of Ulster, New York,
 for the purpose of providing an
 additional supply of pure and
 wholesome water for the use of
 the City of New York.

242

Ashokan
 Reservoir,

Section 15,

Parcel No. 733.

WILLIAM SAGE, JR.,
 Claimant,

vs.

THE CITY OF NEW YORK,
 Petitioner.

243

New York City, N. Y., Feb. 15, 1911.

The Commission convened at 2 P. M., pursuant to
 adjournment, at Room 700, No. 47 Cedar Street,
 New York City.

244 Present—Hon. GEORGE E. WELLER, Chairman,
Hon. FRED H. PARKER,
Hon. GEORGE W. BATTEN,

Commissioners of Appraisal.

APPEARANCES:

ARTHUR S. BARNES, Esq., for the Corporation Counsel of the City of New York.

EDWARD A. ALEXANDER, Esq., for Claimant, William Sage, Jr., *in re* Parcel No. 733.

245

PETER EIBERT NOSTRAND, being first duly sworn by the Chairman of the Commission, testifies as follows in regard to Parcel No. 733:

Direct-examination—By Mr. Alexander:

Q. Where do you reside, Mr. Nostrand?

A. In Brooklyn.

Q. By profession, you are a surveyor and civil engineer?

A. Civil engineer and city surveyor.

Q. You have been actually engaged in the practice of your profession, as civil engineer, for a great many years?

246

A. Yes, since my graduation in 1875.

Q. Can you tell the Commission your experience in connection with water supply?

A. Yes; I began somewhere about 1886 my connection with water supply (I am speaking now from memory), when I became connected with a company known as the Ramapo Improvement Company, and under the direction of its then chief engineer, Mr. William J. McAlpine, I made a number of surveys of reservoir sites up on the Ramapo River, extending along for about two years, at

the same time making a number of calculations and estimates of cost under his direction, and at this time, as his assistant, made up some estimates of cost of water supply or construction of reservoirs; I think one of them was in Albany, one was at Buffalo, and one at Brooklyn. About 1898 or 1899, I forget which year it was, the Ramapo Water Company was organized, and they took over the maps and plans, surveys and other work that had been made up to that time, and I continued as the assistant of Mr. McAlpine, in connection with that company. We extended our surveys on the Ramapo River, filed a number of maps showing the result of the information gathered from these surveys, and the result of the surveys, and extended the investigations and surveys to the Poppolopon Creek, which empties into the Hudson at Fort Montgomery, and Cedar Creek, which empties into the Hudson at Haverstraw. The maps showing the result of these surveys were also filed.

Q. You mean filed in public office?

A. In public offices of the County Clerks of Orange and Rockland Counties, I think those tended to. This work extended along until 1899. I remember it—

Q. To 1891?

A. Yes. It may have gone along as far as 1892; about 1893, Mr. McAlpine having died during the year 1892, the Board then elected me the chief engineer of the company.

Q. You mean the Board of Directors of the Ramapo Company?

A. Yes, elected me as his successor, and I extended these surveys upon the tributaries of the Hudson, including the Esopus, the Catskill and Schoharie—

Q. Water sheds?

A. Water sheds. I think this work was begun about 1893.

250 Q. What was the object of the Ramapo Company in doing all this work?

A. The company was formed to supply water to and constructed works for the purpose of supplying water to municipalities, and for other purposes.

Q. Did the other purposes include power purpose?

251 A. It did. Between the times that I mention carrying on this work of survey and estimates, and plans preliminary to actual construction, the company had made propositions to supply water to the City of Brooklyn, and I think, informally, to the City of New York, but I am not sure whether that was done or not. There had been formal applications to supply water to the City of Brooklyn and also to some other places.

Q. Did the Ramapo Water Company contemplate acquiring the Ashokan reservoir site and the Ramapo water shed?

A. They contemplated doing so, and had filed maps, and had made surveys of portions of that site, and covering a part of it and eventually would have filed maps of every portion of the site.

Q. They contemplated acquiring the site?

A. They contemplated doing so.

252 Q. For the purpose of impounding the waters of the Esopus and of constructing a storage reservoir upon the Ashokan reservoir site, which the City of New York is now utilizing for that purpose?-

A. Their plan, so far as it was worked out at that time, contemplated the construction of several reservoirs, of smaller capacity, on the site now known as the Ashokan site.

Q. In the course of acquiring that land, did you act as the agent of the Ramapo Company?

A. I did.

Q. And was it in the line of your duty to go to Ulster County and personally buy the lands there which form parts of the Ashokan Reservoir site, at as cheap a price as you could obtain them for? 253

A. It was.

Q. In the performance of that duty, will you explain to the Commission what you did in acquiring these lands?

A. For a number of years, extending probably from 1894 or 1895, to about 1900, I made contracts with certain parties upon the site of this reservoir, at controlling points, for the purchase of land, and paid down on those contracts the first payment; some of these contracts were renewed and extended upon further payments, for several years. About the year 1899—1898—or 1899, a large number of contracts, probably fifty to sixty contracts, were made in this section. 254

Q. Did the owners of the lands which you had acquired, and of the other lands which you contemplated acquiring, know that you were using these lands for reservoir purposes?

A. Yes.

Q. Did that have any effect on the price of the land?

A. I think it did.

Q. When you started to buy your first parcels of land, you tried to get them as cheap as you could? 255

A. Yes.

Q. When it became known throughout that section, at that time, that you were purchasing this land for reservoir purposes, did the price of the remaining land go up?

A. It did, to some extent, but the contracts were mostly made within a few days, so as to prevent the rise in value.

Q. During what years was that?

A. That, as I remember it, was in about 1898 or '99. I can get—I have some memorandum here

256 (referring to memorandum)—no, this doesn't give the dates.

Q. About 1899?

A. Yes.

Q. So that it was well known throughout that section of Ulster County, at that time, that there was a demand for this land for reservoir purposes?

A. Yes.

Q. To all the inhabitants of this section?

A. Yes. My purchases were not only made at the site of the Ashokan Reservoir, but a number were made above on the same stream.

257 Q. On the Esopus?

A. Yes.

Q. You have appeared as a witness for the City of New York in quite a number of the proceedings for the acquisition of land by the City of New York, under the Act of 1905, have you not?

A. I have appeared in a number of these proceedings.

Q. You were called as a witness by the City of New York in many cases, were you not?

A. Yes.

Q. On one occasion, in Parcel No. 264, you were examined by Senator Linson, who was then counsel for the City of New York, were you not?

258

A. I know I was examined in a number of these parcels.

Q. And in nearly every instance where you testified as to the value of lands, the various Commissions usually placed a value on the land above what you testified to, did they not?

A. I could not say that.

Q. Now, you made—did you make purchases of real estate in Ulster County?

A. Yes, under contract.

Q. In Greene, Orange and other counties in New York State?

A. Yes, actual purchases made in Orange County 259
of the land.

Q. Made some actual purchases in Ulster
County?

A. Yes.

Q. You made something like over 100 purchases
of land in Ulster County, did you not?

A. In Ulster and Greene Counties.

Q. And some of your purchases included land in
this reservoir site?

A. It did.

Q. There were nearly a 100 within that limit,
were there not?

A. Not within the reservoir site, I don't believe 260
there were a hundred.

Q. That is within the counties I am speaking of?

A. Yes.

Q. Now, the Ramapo Water Company contem-
plated constructing a reservoir upon the Ashokan
reservoir site, and impounding the waters there and
constructing an aqueduct to run from the Ashokan
reservoir to the City line of the City of New York?

A. Yes.

Q. And of selling the water to be developed from
the Esopus water shed to the inhabitants of the
City of New York?

A. To the authorities of the City of New York.

Q. To the City as a City? 261

A. Yes.

Q. And the City itself would then sell the water
to its own inhabitants?

A. Yes.

Q. Had the Ramapo Company entered into a con-
tract with the City of New York for the sale to
New York, at \$70 per one million gallons?

A. No, it had not.

Q. Contemplated doing so?

A. Yes, it contemplated doing so, and the Cor-
poration Counsel of the City of New York had
drawn up a contract for the purpose of signature.

262 Q. How many gallons, per day, did the Ramapo Water Company offer to sell?

A. 200 million gallons per day.

Q. At that rate the Ramapo Company contemplated making a profit of the business, did it not?

A. It surely did.

Q. Have you any idea from your personal knowledge, what profit the Ramapo Company estimated—what profit it would make from the sale of water of the Esopus water shed to the City of New York?

A. \$70 per one million gallons. My ideas are rather general at this time, but as I remember it, it was somewhere about 20%, after allowing for the payment of interest on bonds.

263 Q. That is 20% net profit?

A. Yes, sir.

Q. On selling water to the City of New York, at \$70 per one million gallons?

A. That is my remembrance of it.

Q. You have made a compilation from the official records of the Water Commissioners' office, in New York City, showing the prices paid by consumers to the City of New York, for water during the year 1900?

A. I helped in the preparation of this, yes.

264 Q. And are the facts contained in the paper which I show you, which has been referred to, accurately stated?

A. I believe they are (referring to paper).

Q. Are they accurate?

A. I believe so.

Paper offered in evidence.

Received and marked "Claimant's Exhibit G, February 15, 1911."

Mr. Alexander: I ask that same be spread on the minutes.

No objection.

CHART

TOO

LARGE

FOR

FILMING

Q. Could the Ashokan Reservoir site, in your opinion, be utilized for any other purpose than that of a storage reservoir for supplying drinking water and water for municipalities and other purposes, to the inhabitants of New York City and other cities along the Hudson? 265

A. Could it be used for any other purpose?

Q. Yes.

A. It could be used for power purposes.

Q. Supplying power to various cities and villages along the Hudson and to the inhabitants of New York City and Albany?

A. Yes, sir.

Q. It could not be used for both power and water purposes, at the same time? 266

A. No, excepting that the surplus water from that reservoir might be used for the power purpose, but the use for power reduces the head to the extent that it is used.

Q. Would also contaminate the water, would it not?

A. Not necessarily.

Q. As far as you know, it was never contemplated using either the water, or surplus water, for both power and municipal purposes, at the same time?

A. It was not.

Q. Did the Ramapo Water Company contemplate getting this two hundred million gallons of water per day from the development of the Esopus water shed, alone? 267

A. Yes.

Q. Have you any idea of the estimated cost of construction which was made by the Ramapo Company for the development of that much water?

A. Less than fifty million dollars; don't know just exactly what it was.

Q. At \$70 per one million gallons, for the two hundred million gallons that the Ramapo Water

268 Company contemplated selling to the City of New York, what would that amount to, per day, can you figure that out?

A. \$14,000 per day.

Q. And 365 days in the year?

A. \$3,110,000 per year.

Q. So that you would have made about one million dollars per year, net profit, out of that transaction, over and above the interest on your bonds?

A. At the rate of 20 per cent., yes.

Q. And, of course, had the City of New York entered into that contract, the City, itself, would have made all the profit over and above \$70 per one million gallons that the City could have gotten out of its inhabitants?

269

A. Excepting, of course, the cost of distribution.

Q. Have you ever had any experience in ascertaining the cost of distribution of the water as it is distributed, or then was distributed, by the City of New York?

A. I made calculations of it at one time.

Q. Made estimates about that?

A. Yes.

Q. Can you give us the approximate amount?

A. I could not give it now.

Q. Could you at some other time?

270

A. Yes.

Q. Now, assuming, that, as Commissioner Chadwick has already testified here, that after the water supply system which the City of New York is now constructing is completed, that the whole system will be paid for within about ten years after the same has been completed, from the sale of water that is furnished from the system, and that thereafter there will be a net profit of eleven million dollars per annum to the City of New York, could you figure out, assuming the cost of the entire system to the City as one hundred and seventy-seven

million dollars, at what rate the City of New York contemplates selling the water for at one million gallons? 271

A. I think I could.

Q. Assuming that the City sells five hundred million gallons per day?

A. It would take some time to figure that out. I could not do it now; I don't like to make calculations; would like to get that absolutely correct, because we have Commissioner Chadwick's estimate that there would be a net profit of eleven million dollars on this investment.

Commissioner Batten: Figure it out on 4 per cent. on a thousand gallons. 272

The Witness: That makes \$7,300,000 profit.

Q. The amount, per one million gallons, that the City contemplates selling the water from this system, in order to make a profit of eleven million dollars annually after the works are paid for. Capitalized at 5 per cent. what would the eleven million amount to?

A. Two hundred and twenty million dollars.

Q. So, at that rate, the entire value of this system would be two hundred and twenty million dollars?

A. Yes. 273

Q. And the cost which the City contemplates paying for it, one hundred and seventy-seven million dollars?

A. (No answer).

Mr. Alexander: I offer in evidence pages 3069 to 3074, containing the names, dates and amount of acres purchased by the Ramapo Water Company from the owners of lands in the Ashokan Reservoir, Ulster

274

County, and ask that same be incorporated in the minutes.

Chairman: Any objection? None. So ordered.

[Printed as Appendix II.]

Q. When you wanted to renew some of these contracts, in some instances, the owners refused to renew them unless you paid a larger price, isn't that true?

A. I think it was true in one or two instances.

275

Q. And did you renew the contracts at an increased price, in these instances?

A. I believe so.

Q. Do you recall Joseph S. Hill, of Olive?

A. Yes; I think that was one of the cases.

Q. He was one of the City's witnesses, wasn't he?

A. He was.

Q. The Ramapo Company had an option on his property?

A. It did.

Q. His property consisted of about 30 acres, didn't it?

A. Yes.

Q. They had an option on it for about \$2500?

A. I think so.

276

Q. Did he raise the price on you when you came to renew?

A. I am under the impression he did; if so, I don't know just what the amount was, but it was a small amount, one hundred or a couple hundred dollars.

Q. By that time it had become known that you represented the Ramapo Water Company, had it not?

A. Yes.

Q. You were buying all this land up there for the Ramapo Water Company, for the purpose of using it for reservoir purposes? 277

A. Yes.

Q. Didn't intend to use any part of it as farming land?

A. No.

Q. Did the Ramapo Company contemplate furnishing water in other communities or municipalities, besides the City of New York?

A. It did.

Q. Can you name some of them?

A. Albany, Newburgh, Kingston, Poughkeepsie, and a number of small places between New York City and Albany. 278

Q. And at that time, that is, during the years 1899 and 1900, and from there on, was there a growing demand for water from those cities?

A. Yes.

Q. And the population of those cities through the valley of the Hudson was increasing from time to time, as shown in the census reports?

A. Yes.

Q. You don't know whether the City of New York utilized any of the work of the Ramapo Company?

A. I presume that they did. Freeman, in making up his report, had access to the maps and surveys that were made by the Ramapo Company, both on the Esopus and the Catskill and the Schoharie, and the City has taken up the same locations. 279

280

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT—NEW YORK COUNTY.

In the Matter

of

281

The Application and Petition of
JOHN A. BENSEL, CHARLES N.
CHADWICK and CHARLES A.
SHAW, constituting the Board
of Water Supply of the City of
New York, to acquire real es-
tate for and on behalf of the
City of New York, under Chap-
ter 724 of the Laws of 1905,
and the Acts amendatory there-
of, in the Town of Hurley,
County of Ulster, New York,
for the purpose of providing an
additional supply of pure and
wholesome water for the use of
the City of New York.

Ashokan

Reservoir,
Section 15,

Parcel No. 733.

282

WILLIAM SAGE, JR.,
Claimant,

against

THE CITY OF NEW YORK,
Petitioner.

New York City, N. Y., Feb. 21, 1911.

The Commission convened at 11 A. M., pursuant
to adjournment, at Room 700, No. 47 Cedar Street,
New York City.

Present—Hon. GEORGE E. WELLER, Chairman,
 Hon. FRED. H. PARKER,
 Hon. GEORGE W. BATTEN,
 Commissioners of Appraisal.

283

APPEARANCES:

ARTHUR S. BARNES, Esq., for the Corporation Counsel of the City of New York.
 EDWARD A. ALEXANDER, Esq., for Claimant, William Sage, Jr., *in re* Parcel No. 733.

284

JOHN H. SACKS, called as a witness for the claimant, and being first duly sworn by the Chairman of the Commission, testifies as follows in regard to Parcel No. 733:

Direct-examination—By Mr. Alexander:

Q. Where do you live, Mr. Sacks?

A. West Hurley.

Q. How long have you lived there?

A. All my life.

Q. Are you familiar with Parcel No. 733, Section 15, in the Ashokan Reservoir district?

A. I am.

Q. That property is known as the Sacks' property, is it not, and owned by your uncle for a great many years?

285

A. Yes, sir.

Q. You live right across the way from the City?

A. About a quarter of a mile from it.

Q. How long have you been familiar with it?

A. For the last fifteen or twenty years, particularly fifteen years.

Q. Have you been a witness in estimating the value of land in these proceedings?

286

A. Yes, sir.

Q. Witness for claimant?

A. Yes, sir.

Q. And testified to the value of land in these proceedings, on a number of occasions?

A. Yes, sir.

Q. Can you describe to the Commission this property, Parcel No. 733?

A. Section 15, Parcel No. 733, is a farm of 86½ acres, lies on the Glenford Road, about 2½ miles from the Village of West Hurley; it is about a quarter of a mile from the Glenford post office, school, church—

287

Chairman: That is, you mean it is the same distance from the school and church?

Witness: Yes.

288

A. (Continued.) Consists of meadow, pasture and tillable land, woodland. Has a house, hennery, barn, wagon house, granary, pig pen. The main house is 22 ft. x 16 ft. 6 in., two story, gable and shingle roof, has a stoop in front; 5 ft. x 22 ft. shed, shingle roof, ceiled overhead, 3 in. flagstone floor; has an addition to the west, 14 ft. x 21 ft., gable shingle roof, one story; addition to the south, 14 ft. x 21 ft. 6 in. gable shingle roof; first floor five rooms, summer kitchen; second floor has three bedrooms, hall and the open garret. There is a cellar in this house, 14 ft. x 20 ft., dry wall, part dirt and part flagstone floor. The house has three chimneys. The rooms are painted, papered and in good condition. The house stands about eighty or ninety feet from the road; has eighty feet of two-foot walk, leading from the road to the house; ten feet of two-foot walk, leading from the house to the well; has a good well, about twenty-four feet deep, stone fitted, with curb and bucket. There are two large maple shade trees and two hickory trees near the

house. There is a smokehouse 5 ft. x. 6 ft., gable, shingle roof, sided, not painted. There is a toilet, 5 ft. x 5 ft., lapsided, gable and shingle roof. Hen-nery, 15 ft. x 21 ft., novelty sided, and painted red, gable, paroid roof; the floor is divided in two parts, by partition; there are three large windows. In addition to this, 8 ft. x 18 ft. shed, lapsided, two win-dows, paroid roof. On the opposite side of the road there is a barn, 30 ft. 8 in. x 40 ft. 6 in., has a gable and shingle roof, part novelty and part lapsided, painted red. 289

Q. In what condition is it in?

A. All in good condition. One end of this barn has five cow stalls, hay mound, and the other end is fitted with horse stalls, floored with two-inch plank and in good condition. There is a wagon house, 15 ft. x 30 ft. shed shingle roof, lapsided and painted red, in good condition. There is a hay barn in shed, 17 ft. 6 in. x. 37 ft., sided up and down and battened, not painted. There is a granary, 12 ft. x 16 ft. 6 in., sided up and down and battened, and painted red, has a ceiled roof, all floored; has a corn crib on one side, three grain beds on the other. There is a pig pen, 12 ft. 6 in. x 12 ft. 6 in., lapsided, gable and shingle roof, not painted; has a two-inch plank floor—that is all the buildings. 290

Q. You are not an expert on the value of timber, are you, Mr. Sacks? 291

A. Yes, sir.

Q. Is there any timber on this property?

A. Yes, there is wood and some timber.

Q. What is the character of the timber, in a general way?

A. Fire wood and cord wood and white pine trees suitable for lumber.

Q. I show you two photographs and ask you if these are photographs of some of the buildings on the property?

292 A. (Looking at photographs.) Yes, sir; this is the dwelling house (indicating)—this shows the barn, wagon house, shed additions and granary (indicating).

Mr. Alexander: I offer these in evidence.

Chairman: Objection.

The Chairman: Any objection.

Mr. Barnes: No objection.

Two photographs admitted in evidence and marked "Claimant's Exhibits G-a and H,, February 21, 1911."

293 Q. Did you examine this property for the purpose of estimating its fair and reasonable market value, and of testifying to that market value, at this hearing?

A. I did.

Q. When did you examine it last?

A. February 18, 1911.

Q. And before then, you had examined it also?

A. Yes, sir, December 7, 1909.

Q. Now, is there upon the property a quarry?

A. Yes, sir.

Q. Was that quarry formerly worked?

A. Yes, sir.

Q. To your personal knowledge?

A. Yes, sir.

294 Q. Was stone taken out there and sold in the market?

A. Yes, sir.

Q. You are not a quarry expert, are you?

A. I am not, no, sir.

Q. In estimating the value of the property, you established its value merely for farming purposes, for its use as a farm, did you not?

A. Yes, sir.

Q. Exclusive of the element of value which the quarry would add to the value of the land?

A. Yes, sir.

295

Q. And entirely exclusive of its reservoir element of value?

A. Yes, sir.

Q. Will you state to the Commission what was the fair and reasonable market value of this land, when the City of New York took title to it, about May 22, 1909, exclusive of quarry and reservoir values?

A. \$12,000.

Q. In making that estimate of approximately \$12,000, how much did you allow for the buildings and other improvements upon the property?

A. \$5,225 for the buildings.

296

Commissioner Parker: Will you subdivide that.

A. (Continued.) House, \$2,800; toilet, \$25; smoke house, \$25; hennery, \$300; barn additions, \$1,800; that includes wagon house and shed, granary, \$200; pig pen, \$75; the land, \$6,920; \$80 an acre, that is \$12,145.

Q. In making that estimate, did you take into consideration the different kinds of land which compose this property?

A. Yes, sir.

Q. Will you point out from the map shown to you what kinds of land compose Parcel No. 733?

297

A. (Looking at map.) I recognize this as a copy of the Official Map of Section 15, and showing Parcel No. 733 thereon, on sheet 85 and sheet 86.

Q. Are the different kinds of land properly designated on this map which has been shown to you, on sheet 85 and sheet 86?

A. Meadow land, tillable, pasture and woodland.

Q. And is there sufficient wood on the property which would be necessary for a good farm?

A. There is; yes, sir; both wood and lumber.

298 Q. You have not taken into consideration any value for the well on the property?

A. Yes, sir.

Q. What would it cost to bore a 24-foot well, properly equipped?

A. Why, it depends, about the average to dig a well like this, \$4 per foot. You know sometimes it is pretty hard to find a good well, you can dig and dig and get nothing.

Q. Would this well add an additional approximate one hundred dollars to the value of the property?

299 A. Why, it certainly does, because it is a good well.

Q. In your opinion, does the valuation of the structures upon this property enhance the entire value of the property to the extent of the value of the structures?

A. It does to the extent I have testified to.

Q. In other words, the structures were suitable to that locality?

A. Suitable for the farm in every respect.

Q. Was that a boarding house section when the City took title?

A. Yes, sir.

300 Q. Did your uncle use to sell eggs, milk, from that farm to the various boarding houses in that immediate vicinity?

A. Yes, sir.

Q. What can you say about the general location of the property?

A. It is very nicely located; the house is located a little above the road; stands on a knoll; there is a nice view of the valley.

Q. Well shaded?

A. Yes, sir.

Q. Good spring water across the road from the barn?

A. Good spring at the pasture lot.

301

Q. Anything like this water which the City of New York expects to get?

A. Yes, sir.

Q. Suitable for watering cattle?

A. Yes, sir.

Q. And household purposes?

A. Yes, sir.

Q. You say the property is well located?

A. Yes, sir. There is also an orchard on this place, right near the house, which I forgot to mention before, because it was on another page of my book—with twenty-five apple trees, three cherry trees, four pear trees, twelve plum, two grape vines, eight rows of shrubs, two maple and two hickory shade trees.

302

Q. Were these trees fruit-bearing trees at the time the City took title?

A. Yes, sir.

Q. And to your personal knowledge, had they borne fruit?

A. Yes, sir.

Q. Do you know if your uncle sold any of it, or used it for home consumption?

A. That I do not know.

Cross-examination—By Mr. Barnes:

Q. Mr. Sachs, you say you have known this property a great many years?

303

A. Yes, sir.

Q. How old are you?

A. Twenty-nine

Q. Have you known it twenty-nine years?

A. I remember it more particularly for the last fifteen years.

Q. Didn't you remember it well enough so as to remember the orchard, without reading it from the book?

304

A. Maybe not.

Q. You didn't state there was an orchard, in your first description, did you.

A. Yes, sir.

Q. Were you testifying from your knowledge, or your notes?

A. Why, I was testifying from my knowledge, I used the notes to refresh my memory.

Q. After fifteen years' intimate acquaintance with the property you have to use notes to recall it?

A. Yes, sir.

Q. What is your business now?

A. Livery business.

305

Q. And by virtue of what do you come before this Commission to tell it the fair and reasonable market value of that property?

A. I have been a farmer all my life and am familiar with the prices of farms in that locality.

Q. How?

A. I have known of some sales, I know the condition of the land and know what it is suited for.

Q. Is it the knowledge of the farm itself, or the knowledge of the sales, that renders you competent to tell the Commission how much the farm is worth?

A. A little of both, I think.

306

Q. But you had to know about the sales, didn't you, in addition to your knowledge of the farm?

A. I do know of some.

Q. In your opinion, would you have been able to fix the valuation of this farm without knowing the sales of any land?

A. Certainly not.

Q. So that the knowledge of sales was one thing that aided you in fixing the valuation?

A. It aided me.

Q. What is this amount that you have given, of \$12,000?

A. I think this is the fair market value of this farm.

Q. What it would bring if it were in the market? 307

A. Yes, sir.

Q. That is what you mean by market value?

A. Yes, sir.

Q. Do you know when the present owner bought this farm?

A. I do not.

Q. Don't know how much he paid for it?

A. No, sir.

Q. You took care not to find it out?

A. I did not.

Q. Did you try to find out?

A. I asked about it.

Q. From who?

A. I think I asked my uncle at one time.

Q. Did you ask him anything else?

A. I don't remember as I did.

Q. You never asked Mr. Sage?

A. I never saw the man but once.

Q. Do you know Mr. Burhans?

A. Yes, sir.

Q. Did he ever own the property?

A. I cannot say.

Q. Do you know Mr. DeLee.

A. No, sir.

Q. Did he ever own the property?

A. I don't know.

Q. Yet you say you are familiar with sales in this locality? 308

A. Yes, sir.

Q. Now, Mr. Sacks, how long have you been in the livery business, did you say?

A. About eight years.

Q. Are you a real estate man now, agent?

A. No, sir.

Q. How long since you have been a real estate agent?

310 A. I have never been a real estate agent, to any extent.

Q. I see, you are an expert witness. Is that what you call your business now, experting?

A. No, I am in the farming and livery business.

Q. You estimate the value of these buildings, exclusive of the land, at \$5,225?

A. Yes, sir.

Q. Did you make an estimate of what it would cost to replace those buildings?

A. I did not.

Q. How did you arrive at that sum of \$5,225?

311 A. Well, we took the farm as a whole—thought it would bring \$12,000 in the market.

Q. You say "we," what do you mean by "we"?

A. I think we all talked it over.

Q. With who?

A. With some of the witnesses.

Q. Which witnesses?

A. I think we have all talked it over to some extent.

Q. You cannot remember which one you talked it over with?

A. I talked it over to some extent with all.

Q. Did you talk it over with Mr. Burhans?

A. Yes, sir.

312 Q. Which one?

A. Edwin Burhans.

Q. Did he agree with you?

A. I don't know as he did, he didn't say.

Q. What did you talk about then, if you didn't talk about the value of the buildings?

A. We talked about the value of the farm as a whole.

Q. Did you tell him what you thought the buildings were worth?

A. Yes, sir.

Q. Did he tell you what he thought the buildings were worth?

A. Yes, sir.

313

Q. What did he say?

A. I don't remember his exact figures.

Q. This figure of \$5,225 is what you told Mr. Burhans you thought the buildings were worth?

A. I think so.

Q. It is then not an estimate as to the structural cost?

A. It was, some.

Q. Was it made on a basis of each building, independent of the other?

A. I think we separated the land and buildings first.

Q. You say you think "we" did?

314

A. Yes, sir.

Q. That is you all agreed?

A. We all talked this over together.

Q. You think this farm is worth, approximately, \$80 an acre, without the buildings?

A. Yes, sir.

Q. You say there is a quarry on this property?

A. Yes, sir.

Q. You also said you personally have known it to be worked?

A. Yes, my uncle use to work it.

Q. How long ago?

A. Quite a little while ago. I don't remember just how long ago.

315

Q. But you remember it was worked?

A. Yes, sir.

Q. Was it five years ago?

A. Longer than that.

Q. Ten years ago?

A. In that neighborhood.

Q. Think it was over ten years ago?

A. No, I think there has been some stone taken out since.

Q. By your uncle?

316

A. It was my uncle who owned the place.

Q. When did he own it?

Chairman: How long ago?

The Witness: Near twenty-three years.

Q. He didn't work it within ten years, you say?

A. I don't think so. He was quite an old and feeble man.

Q. Can you tell the Commission the last time the quarry was worked?

A. No nearer than I have said.

Q. No nearer than ten years?

A. No, sir.

317

Q. Do you know when the buildings were built?

A. Why, no, the barn has been re-sided lately.

Q. Is that your idea about being "built"?

A. No, I do not know when they were first built, except the hennery, which was about six years ago.

Q. That is the only building you can state when it was built?

A. Yes, sir.

Q. Was the house built prior to that?

A. Yes, sir.

Q. Was it on the property when you first remembered the property?

A. The main house was, I cannot say as to the additions.

318

Chairman: Did you see this house constructed?

The Witness: I did not.

Q. Now, Mr. Sacks, you say you don't know if Mr. DeLee ever owned the property?

A. No, sir.

Q. Do you know who owned it prior to the time Mr. DeLee owned it?

A. No.

Q. Who did your uncle sell it to?

A. I don't know, unless to the present owner.

319

Q. When did your uncle sell this property?

A. In the neighborhood of three years ago, don't remember exactly.

Q. And at that time you were in the livery business?

A. Yes.

Q. Livery and farming business?

A. Yes, sir.

Redirect-examination—By Mr. Alexander:

Q. Was your uncle a very old man when he sold the property?

A. He was very feeble, but I do not know just his age. 320

Q. Without knowing his exact age, would you say he was over sixty?

A. Yes, sir.

Q. Over seventy?

A. I would say he was in the neighborhood of seventy.

JOHN D. VAN KLEECK, called as a witness for the claimant, and being first duly sworn by the Chairman of the Commission, testifies as follows, in regard to Parcel No. 733:

321

Direct-examination—By Mr. Alexander:

Q. Where do you live, Mr. Van Kleeck?

A. Shokan.

Q. Are you familiar with Parcel No. 733, Section 15?

A. I am.

Q. You have examined it carefully for the purpose of testifying to its fair and reasonable market value in these proceedings?

A. I did.

Q. You appear as a witness for the claimant?

322

A. Yes, sir.

Q. You heard Mr. Sacks describe the property?

A. I did.

Q. Did he give an accurate description of it?

A. Yes, sir.

Q. In your opinion, what was its fair and reasonable market value at or about May 22, 1909, when the City of New York took title to it?

A. \$12,000.

Q. Did you make an estimate of the structural value of the various buildings and improvements on the property?

A. I did not.

323

Q. You valued it as a whole?

A. Yes, sir.

Q. Including everything?

A. Yes, sir, exclusive of quarry.

Q. Exclusive of quarry and reservoir value?

A. Yes, sir.

Q. You are not an expert on any one of these subjects?

A. No, sir.

Q. You simply have given the fair and reasonable market value for farming purposes, for its use as a farm?

A. Yes, sir.

324

Q. What experience have you had in valuing property in that section?

A. I have heard of several sales in that section, but I have never sold or bought any property in that section, but in the adjoining town.

Q. Are you familiar with the prices awarded by some of the Commissions in these other proceedings, for land take in condemnation, in that section?

A. Yes, sir.

Q. Do you know what was awarded for the Glynn property, at Shokan, consisting of thirty acres?

A. I do.

Q. How much was awarded for that property?

A. About six hundred dollars an acre.

325

Q. Six hundred and sixteen dollars per acre, was it not?

A. Yes, sir.

Q. And the actual award?

A. \$18,000.

Q. Eighteen thousand five hundred dollars, is it not?

A. That may be true, I was thinking it was \$18,000.

Q. From your recollection, it was about \$600 per acre?

A. Yes, sir.

Q. That valuation was placed upon the property, exclusive of all expenses in acquiring the property?

326

A. No, sir.

Q. Exclusive of the fees paid to the Commission for condemning the property?

A. Yes, sir.

Q. Do you know how much, per acre, was awarded for the George Ennis property, consisting of 10½ acres, no buildings?

A. Why, I do not. I have heard of that award, but have not it in mind.

Q. Do you know the DeWitt Ballard property, consisting of 16½ acres? Know what award was paid?

A. I do not.

327

Q. You have had other experience in estimating the value of property in that section, have you not?

A. I have bought and sold farms, owned farms and own farms to-day.

Q. And the valuation which you place upon this property, Parcel No. 733, Section 15, for farming purposes, and farming purposes only, is fair and reasonable in your judgment?

A. It is.

328 Q. Was the fair and reasonable market value of the property when the City of New York took title to it?

A. Yes, sir.

Cross-examination—By Mr. Barnes:

Q. You arrived at that figure of valuation on the basis of the awards you have just spoken of?

A. I did not.

Q. What is your business now?

A. My business is, livery, sale and exchange, undertaker, farmer, real estate expert—I don't know what else.

329 Q. You are a real estate expert?

A. I have been for a few years, yes, sir.

Q. How long?

A. Three years since.

Q. When did you first begin to testify in these proceedings?

A. I couldn't give you the exact dates.

Q. That is you became an expert when you began to testify in these proceedings?

A. Yes, sir.

Q. You keep yourself informed as to the value of property in that section, do you?

A. Somewhat.

Q. To what extent?

330 A. I have bought and sold property, and kept tab with other sales that had been made.

Q. Did you calculate that it was necessary to keep informed as to sales of neighboring properties?

A. Why, not exactly; of course, it helps to keep track of the value of other property.

Q. Did you keep track of the sales to make you more competent?

A. I did not.

Q. Didn't consider that necessary?

A. No, sir.

Q. Then why did you keep track of the sales?

A. For my own convenience.

331

Q. For your own convenience, and because you liked to do it?

A. Not exactly; I own property and like to keep track of sales, as made.

Q. Do you know of the sale of this property to the present owner?

A. No, sir.

Q. Didn't keep track of that?

A. No, sir; I heard of the sale.

Q. You don't know what he paid for it?

A. No, sir.

Q. Didn't make any inquiries?

A. No, sir.

Q. Never?

332

A. Never.

Q. That sale didn't interest you?

A. I never met the party who sold it.

Q. And never met the party who bought it?

A. I think I did.

Q. Do you know who he bought it from?

A. Why, Mr. Sacks, I believe.

Q. Don't know he bought it from Mr. Burhans?

A. I never knew he owned it.

Q. Do you know when the present owner bought the property?

A. Somewheres in the neighborhood of about two or three years, to the best of my knowledge.

333

Q. Yet you kept track of sales in this vicinity?

A. Somewhat, yes, sir.

Q. Now, what do you say about these buildings?

A. These buildings are all in good condition, except the hog house, that is not in the best of condition. They were well kept.

Q. How much do you think they are valued at?

A. \$5,225.

Q. That is just the amount Mr. Sacks testified to, isn't it?

334

A. Yes, sir.

Q. Did you get that figure from him?

A. We talked it all over; we perhaps varied some, may be.

Q. Do you know whether you did vary any?

A. I couldn't tell just now.

Q. Couldn't remember?

A. I dare say we did.

Q. Would you dare say you were higher or lower?

A. I may have been higher or lower.

Q. And he may have been higher or lower?

A. I can't remember that, it was a little while ago.

335

Q. Was your estimate based upon a knowledge of structural cost?

A. No, sir.

Q. Did you do as Mr. Sacks did, separate the buildings from the land?

A. Yes, sir.

Q. And the value of the land was, approximately, eighty dollars per acre, without buildings?

A. Yes, sir.

Q. How long have you known the property?

A. I have known it for the past fifteen or twenty years; passed by it a number of times.

Q. Knew there was a quarry on it?

A. Yes, sir.

336

Q. Know when it was worked?

A. I could not say the date it was worked, but it has been worked.

Q. Can you say the last time you remember it being worked?

A. I could not; it is too far back; the quarry lies back of the buildings in the field, and you do not see very much of the quarry in passing by the road; I have been through it, but could not say when it was worked.

Q. You didn't know the property intimately for the last fifteen years, did you?

A. No, I didn't; I traveled over it every time I went through there. 337

Q. How do you know it was over worked?

A. If you go through there and see the pile of rubbish there, you would say it was worked.

Q. That is the basis on which you make that statement?

A. It is not; there are other facts to convince you; it shows you the bed of stone.

Q. Can you say whether it was worked in the last five years or not?

A. No, I cannot.

Q. You mean you would say it had been worked in the last five years? 338

A. No, sir.

Q. As a matter of fact, you don't know anything about it?

A. As a matter of fact, I know it has been worked.

Q. You didn't talk your valuation over with anybody; but Mr. Sacks?

A. Yes, sir, we talked it over.

Q. Who?

A. Mr. Burhans, Mr. Winchell and Mr. Haver.

Q. They all agreed with you on your price?

A. Why, I couldn't say just now.

Q. Whether they did, or not, you don't remember?

A. No, sir.

Q. Do you remember whether you were influenced any by their views? 339

A. Not very much, I don't think.

Q. Do you remember how much?

A. That is over two years ago; I could not just say how much. I have—my figures are perhaps not just the same—I figured the land at \$80 per acre for eighty-six acres, I left out half an acre for the quarry; that makes a little difference in totaling up.

Q. That is, you first figured the land as if there were no buildings on it?

340

A. Yes.

Q. There were buildings there, weren't there?

A. We considered the buildings enhanced the value \$5,200.

Q. Now, answer my question, you say there were buildings?

A. Yes, sir.

Q. You said "we", that includes yourself?

A. Yes, sir.

Q. You have bought farms for yourself?

A. Yes, sir.

Q. And yet you went there and figured the value of the land as though there were no buildings on it?

341

A. I have bought farms that way; have one now I figured that way.

Q. That was the basis of your valuation?

A. Why, I don't know as it was on this farm.

Q. Then you varied your usual course of procedure in this case?

A. This farm I bought last, I bought separate from the buildings.

Q. That was because you didn't consider the buildings enhanced the value of the land?

A. That is, because I had a chance to sell the house and barn and considered the land worth so much without the buildings.

342

Q. What is this \$12,000, you testified to?

A. That is the value of this Parcel #733.

Chairman: In its entirety?

The Witness: Yes, sir.

Q. Is that the fair market value at the time the City took title?

A. Yes, sir.

Q. What is fair market value?

A. I consider it the value of a willing seller and a willing buyer.

Redirect-examination—By Mr. Alexander:

343

Q. Will you look upon a copy of the official map, prepared by the City of New York and its engineers, on sheet #85, and state whether the City of New York has indicated on that map where the quarry is located on this property?

A. Yes, sir.

ELMER MOLINEAUX, called as a witness for the claimant, and being first duly sworn by the Chairman of the Commission, testifies as follows, in regard to Parcel #733:

344

Direct-examination—By Mr. Alexander:

Q. Where do you live, Mr. Molineaux?

A. Pine Hill, Ulster County.

Q. And what is your business?

A. Why, real estate dealer.

Q. Do you know anything about quarries?

A. I have a number of quarries on my place, have bought and sold quarries and own a number now at the present time.

Q. Have you worked any quarries?

A. Yes, sir.

Q. Sold the stone?

A. Yes, sir.

345

Q. In the immediate section of this parcel, any in this section?

A. No right along the railroad, the Ulster and Delaware Railroad.

Q. Are you familiar with the sales of stone in the immediate vicinity of Parcel #733?

A. Yes, sir.

Q. And will you point out from a copy of the official map, prepared by the City of New York,

346 on sheet #85, where the City has designated the quarry on this property, Parcel #733?

A. (Referring to map)—

Q. If you don't know, say so. You are not familiar with this map?

A. I never saw this map before.

Q. Did you examine a quarry on Parcel #733, Section 15?

A. I did.

Q. For the purpose of estimating the value of the quarry?

A. Yes, sir.

347 Q. And for the purpose of testifying as a witness on behalf of the claimant in this proceeding?

A. Yes, sir.

Q. Where is the quarry located with respect to the house?

A. It is right on the same rise of ground, about, I should say about fifteen hundred feet from the house; the henery (?) runs right through the property, and the quarry is on the right hand side of the property as you go towards Glenford from West Hurley.

Q. When did you make the examination of this quarry?

348 A. Why, I made this examination first for the property, and then I found this quarry there and was sent back to examine the quarry. I made an examination of the whole property; I have been testifying on real estate and quarries both.

Q. What did you consider to be the fair and reasonable market value of this property, on or about May 22, 1909. when the City of New York took title.

A. \$13,500.

Commissioner Parker: Inclusive of quarry?

The Witness: Yes, sir.

Q. And exclusive of reservoir?

349

A. Yes, sir.

Q. That is you considered the quarry on the property to enhance its value to the extent of fifteen hundred dollars?

A. Yes, sir.

Q. Can you describe the quarry to the Commission?

A. (Referring to book.) This quarry has been open for 300 feet along its ledge, and there is a bed—we measured back 75 feet—

Q. When you say “we”, whom do you mean?

A. Mr. Walter Lee and myself; it took two of us to hold the tape to measure it; the length of the quarry was 300 feet and 75 feet back, ran across it, and there was a bed of stone about six feet; the bed of the good stone was four feet and there was two feet of top on it, that makes the six feet. Then we figured that up, I mean we figured the length by the breadth, which was 300 ft. x 75 ft. which gave us 22,600 feet, and then the four feet of bed made it 90,000 feet; then we deducted from that, 1/3rd for waste and breaking of stone, leaving 60,000 feet—

350

Q. Cubic feet?

A. Yes, sir,—at 48c. per cubic foot, which gave \$28,800 as a total; then 5% royalty, which is what quarries rent for, which gave \$1440.

Q. That rental value would not be the fair and reasonable market value of that stone?

351

A. I rented a quarry last week of the Coykendalls at 5%.

Q. On a similar valuation to that which you made?

A. Yes, sir.

Q. Just a minute, Mr. Molineaux, the lessee expected to make a profit on that transaction, did he not?

A. Yes, sir.

352 Q. That rental value would not constitute the fair and reasonable market value of that quarry, would it?

A. It helped me to get at the value; I considered that this quarry was worth to a man who would buy it, or, I would be willing to pay \$1500 for it.

Q. That was its fair and reasonable market value, between a willing buyer and a willing seller?

A. Yes, sir. I got up these measurements and figures because they usually ask these questions.

Q. Then you have made that valuation, because that has been the accepted valuation before a number of these Commissions, is that it?

353 A. It is.

Q. That is your valuation on that basis, and on that basis only?

A. Yes, sir.

Cross-examination—By Mr. Barnes:

Q. Mr. Molineaux, you stated that you valued this land at \$13,500, exclusive of reservoir value?

A. Yes, sir.

Q. Did you say that?

A. I did.

Q. How did you know that? ?

A. I heard them say so; I know nothing about that.

354 Q. At any rate, you didn't value it for reservoir purposes, you say?

A. I did not.

Q. The reason you made that statement was because you heard some talk about reservoir purposes?

A. Yes, sir.

Q. You are an expert—you are a quarry expert?

A. Yes, sir. I bought and sold quarries, own a number to-day and rent them.

Q. If you rented this quarry for five per cent. at the time when the stone was taken out, the amount of stone you computed was taken out, and the royalty paid, you would have made, not, \$1440, according to your figures? 355

A. Yes, sir.

Q. That royalty would not be paid until stone was sold?

A. That is right, but, of course, I considered the quarry was worth that. I took that to help me make up my figures.

Q. You consider it was worth \$1500, because 5 per cent. upon the amount that you would have realized from the sale of the stone was \$1440? 356

A. As I said, that helped me to some extent, still the quarry shows up nice. It is a flagstone quarry.

Q. A good quarry?

A. Yes, sir.

Q. There is a demand for blue stone in that section?

A. At West Hurley, two miles from this place; also at Saugerties.

Q. That demand existed at the time the City acquired title to this property?

A. Yes, sir.

Q. Good demand?

A. Yes, sir.

Q. How long have you been interested in the quarry business? 357

A. About fifteen years.

Q. How long have you known this property?

A. I have known this property five years; have ridden through there for the last fifteen or twenty years.

Q. Did you know where all the good quarries were in that section?

A. Knew a good many.

Q. Knew the quarry on this property?

358 A. I had heard about it and saw it, but didn't know this was the Sacks' property. John Sacks' father owned the farm right by this.

Q. When was this quarry worked last?

A. I couldn't say.

Q. Still it was a good quarry?

A. Yes, sir.

Q. Is one of those you didn't know about?

A. Yes, sir.

Q. You put a valuation of \$13,500 on this entire property, are you a real estate expert, too, did you say?

A. Yes, sir.

359 Q. Bought and sold property?

A. Yes, sir.

Q. Was the basis of your conclusion of valuation, the sales you had made?

A. Why, somewhat, yes, sir.

Q. Anything else?

A. Why, my knowledge of real estate, generally.

Q. Gained in any other way than by sales?

A. In buying and looking over property.

Q. That is, your knowledge of other sales?

A. Yes, sir.

Q. Did this help you any?

A. Yes, sir.

360 Q. Did you know of the sale of this property?

A. I did not.

Q. Do you know who owns it now?

Chairman: If you know.

A. I do not.

Q. Was Mr. Sacks the owner at one time?

A. Yes, sir, the two Sacks lived right together; John Sacks' father and he were brothers.

Q. You have known it, how many years?

A. I have been through it and drove cattle through it.

Q. When did he sell it?

361

A. Three years ago.

Q. Did you know of it at that time?

A. It was hearsay.

Q. Did you ask what he sold it for?

A. I did not.

Q. Know who he sold it to?

A. I do not.

Q. As a matter of fact, you don't know anything about the transfer of this property?

A. I do not.

Q. Have you made any inquiries?

A. I did not.

Mr. Alexander: I will now call Mr. Haver. 362
The reason I am not calling the other quarry expert now is that Mr. Haver wants to get away.

WILLIAM HAVER, called as a witness for the claimant, and being first duly sworn by the Chairman of the Commission, testifies as follows, in regard to Parcel No. 733:

Direct-examination—By Mr. Alexander:

Q. Where do you live, Mr. Haver?

A. City of Kingston, Ulster County.

363

Q. Are you familiar with Parcel No. 733, Section 15?

A. Yes, sir.

Q. Known as the Sacks' property?

A. Yes, sir.

Q. How long have you been familiar with the property?

A. I have known this location for the last twenty-five years, but have not been so very familiar with it until the past two or three years.

364 Q. What experience have you had in estimating the valuation of properties in the immediate vicinity of this parcel?

A. Well, I have valued property in this locality, a number of properties.

Q. You have testified as a witness in these proceedings a number of times?

A. Yes, sir.

Q. As to the value of properties?

A. Yes, sir.

Q. Did you examine Parcel No. 733 for the purpose of testifying as a witness at this hearing?

A. I did, yes, sir.

365 Q. What, in your opinion, was the fair and reasonable market value of this property, exclusive of any element of reservoir value or quarry value, and viewing it solely for farming purposes?

A. \$12,500.

Q. Has the property much frontage on a public highway?

A. Why, the Glenford Road runs through the property, east and west, I should say, not entirely through the centre; across the southerly end.

Q. Is there a stone wall in front of the property, facing on the road, do you know?

A. Not in the immediate front of the property, no.

366 Q. Anywhere on the property a stone wall?

A. A great many stone fences.

Q. To what extent?

A. The property is fenced with stone, the majority of it, I think.

Q. Are those stone fences practically about of the same dimensions?

A. Why, they are like the ordinary stone fences in the country, $3\frac{1}{2}$ feet high, $2\frac{1}{2}$ feet on the bottom and top out to about 18 inches.

Q. How many feet of these stone fences are there?

A. I couldn't tell.

367

Q. Don't you regard stone fences as of any value?

A. Oh, yes, they are a valuable fence.

Q. Were the stones here loosely laid?

A. Laid up dry, ordinary stone wall.

Q. One piled on top of the other?

A. Yes, sir.

Q. Are there any other elements of value on the property that have not been described here by the former witnesses, that you have heard?

A. I don't think so; think everything was mentioned.

Q. The former witnesses did not mention stone fences? 368

A. Well, it is a well fenced farm, and they ought to have known that as well as I did; they are in good condition; there are some wire fences also.

Q. Do you know anything about the value of timber?

A. I am not prepared; I do, but I would not care to; I am not prepared to testify to the value of the timber.

Q. You are a builder and have been in the building business?

A. Yes, sir, and building now.

Q. You estimated the structural value of the buildings and other improvements on this property, did you not? 369

A. I did not.

Q. Didn't place any value as to the cost of construction?

A. I did not.

Q. In arriving at the fair and reasonable market value of the property, did you allow any enhancement of the value of the land on account of the buildings and other improvements upon the land?

370

A. I did.

Q. How did you arrive at that enhanced valuation?

A. I considered the valuation of the buildings and land, so much.

Q. How much?

A. Why, about \$5,500, I think, for the buildings.

Q. As a builder, did you form any judgment of the value of these buildings?

A. I did; yes, sir.

371

Q. As a builder, what would you consider to be their fair and reasonable value at the time the City took title to the property?

A. I considered the fair and reasonable value, \$5,500.

Q. After allowing for all depreciation?

A. As I found them.

Q. In making that valuation, \$5,500, did you include any valuation for the well upon the property?

A. I considered everything I found there.

Q. Did that include the stone fences, or did you take the value of the land with the stone fences and other improvements?

A. I took the value of the land and conditions as I found it at that time.

372

Q. What valuation did you put on the land?

A. About seven thousand dollars, I think.

Q. There is an orchard on the property?

A. Yes, a small one, with about twenty-five or thirty trees.

Q. Did you examine the property in the Fall?

A. In December, 1909.

Q. Did you ever see the property during the fruit season?

A. I no doubt have.

Q. Is this orchard a fruit-bearing orchard?

A. Yes.

Q. And the property consists of considerable pasture and tillable land? 373

A. It does.

Q. Good pasture land?

A. Yes, sir.

Q. Would you consider the tillable land to be suitable for the purpose.

A. Some of it is extra good, other not so good; like all other farms, not all alike.

Q. Can you explain how much you consider to be extra good?

A. Why, I would say there is in the neighborhood of twenty to twenty-five acres of the best.

Q. Extra good?

A. Yes, sir. 374

Q. How much tillable land, good, but not extra good?

A. I should say about fifteen or twenty acres, not so good.

Q. Was there some good pasture land upon the property?

A. Yes, sir.

Q. A spring upon the property?

A. There is good spring water; I found two good springs on the property and a well. A small stream of water flowing from the spring to the northern part of the farm.

Q. The property is well watered and well located? 375

A. It is.

Q. Good views to be obtained from the property?

A. Yes, sir.

Q. Describe some?

A. Why, the views are like all other farm property in that country; good mountain views.

Q. Is the property in a hollow or on an eminence?

A. The property is located in somewhat of a valley on an elevation of about five hundred or five hundred and fifty feet, if I remember right.

376

Q. Is most of the property on this elevation?

A. Yes.

Q. Do you know what road frontage the property has?

A. I did not measure it.

Q. You didn't take account of the number of trees on the property, the character of the woodland; Mr. Burhans did that, did he not?

A. I believe so.

Q. The buildings that have been described by Mr. Sacks are the same as you found on the property?

A. Yes, sir.

Q. Did Mr. Sacks describe them accurately?

377

A. He did.

Q. He also gave, as far as you heard his testimony given, an accurate description of this property?

A. He did.

Q. Would you consider it an advantage to a farm to have a well of good drinking-water upon the property?

A. Oh, yes.

Q. Did you take that into consideration with all the other elements?

A. I did; I considered the water was there, good for domestic purposes.

378

Q. You valued the property solely for farming purposes, as a farm?

A. I did.

Q. You didn't take into consideration the value of the quarry on the property?

A. I did not.

Q. Didn't know anything about the quarry?

A. Not very much.

Q. Did you see there was one?

A. Yes, sir.

Q. Had it been working?

A. Yes, sometime.

Q. That was apparent there?

379

A. Oh, yes, there is a large hole dug in the rocks.

Cross-examination—By Mr. Barnes:

Q. How large was the opening you saw?

A. I didn't measure it.

Q. You mean by that you don't know?

A. Yes, I will have to say I don't know because I didn't measure it.

Q. Say Mr. Sacks described this farm accurately, did you not?

A. Yes, sir.

Q. He didn't say anything about fences, did he?

A. I didn't hear him.

Q. Then he didn't describe it accurately, did he?

380

A. He might have omitted something.

Q. If he omitted something would you call that an accurate description?

A. As far as he went.

Q. But it would not be accurate, would it?

A. As far as he went.

Q. Would not be accurate, would it?

A. Well, he might have gone farther.

Q. You spoke about exclusive of something in your valuation—what was that?

A. The quarry, I think.

Q. What else?

A. Reservoir purposes.

381

Q. You didn't exclude any of the buildings, did you?

A. I don't think I did.

Q. No portion of the land?

A. No.

Q. No portion of the fences?

A. No.

Q. Nor trees?

A. No.

382 Q. You included all the farm in your valuation?

A. Yes, sir.

Q. And you bought and sold property?

A. Yes, sir.

Q. Is that the basis for your statement that you know the valuation of property in that vicinity?

A. Somewhat, yes, sir.

Q. By saying "somewhat," do you mean to say that you have other sources of knowledge?

A. General knowledge.

Q. By general knowledge, you mean a knowledge of sales?

A. Yes, sir.

383 Q. Was that used as a basis upon which you made your estimate of valuation?

A. To some extent.

Q. As much of an extent as the sales that you actually made?

A. Well, I could not say whether it was as much or not.

Q. Why couldn't you say?

A. Well, I didn't separate them to see whether it was as much or not.

Q. But you did separate the buildings from the land?

A. I placed a valuation on both.

Q. Based on structural value?

384

A. No.

Q. You are a builder?

A. Yes, sir.

Q. You are a real estate expert, aren't you?

A. Yes, sir.

Q. Do you think a building suitable and adequate enhances the value of the land?

A. I do.

Q. In your opinion, as a real estate expert, does a building, suitable and adequate for its location,

enhance the value of the land, more or less than the structural value? 385

A. Very often more.

Q. That is a real estate proposition, isn't it?

A. Yes, sir.

Q. In your opinion, would a building suitable and adequate that could be constructed at a cost of one thousand dollars enhance the value of the land more than a building, also suitable and adequate, that cost to construct, fifteen hundred dollars?

A. They might both answer the same purpose.

Q. In your opinion, the building costing fifteen hundred dollars to construct, might not add more to the value of the land, than the building that cost only one thousand dollars to construct? 386

A. I think it would.

Q. So that structural value would have a very strong bearing upon the amount that the building added to the land?

A. It would add some weight.

Q. You made no estimate of structural value?

A. I did not go into that, no, sir.

Q. You know who the owner of this property is?

A. No.

Q. Who hired you—beg pardon, who employed you; excuse me?

A. Mr. Alexander.

Q. You don't know who the owner is? 387

A. No, sir.

Q. Did you ever know when Mr. Sacks owned it?

A. Never knew Mr. Sacks.

Q. Ever know a man named Sacks owned the property?

A. From hearsay.

Q. You don't know it from Mr. Sacks?

A. Why, I don't know Mr. Sacks, no, sir; never met him.

- 388 Q. You don't know when he owned it?
 A. No.
 Q. Don't know who he sold it to?
 A. No, I do not know.
 Q. Know Mr. Frank Burhans, don't you?
 A. I do.
 Q. Did you ever know he owned it?
 A. No, I don't know.
 Q. Don't know who owns it now?
 A. No.
 Q. When he bought it?
 A. No.
 Q. What he paid for it?

389

- A. No.
 Q. Ever make any inquiries?
 A. No, sir.
 Q. Ever make any inquiries as to the sale of this property at any time?
 A. No, sir.

Redirect-examination—By Mr. Alexander:

Q. It would not make any difference to you who bought it, or who owned it, in estimating your valuation?

A. No, sir.

390

Q. When asked by Mr. Barnes whether, if a man expended one thousand dollars putting a building on some property, it would enhance its valuation to a certain extent, and that, if he expended fifteen hundred dollars putting a building on the property whether it would enhance the valuation to a greater extent, you answered you thought that the expenditure of fifteen hundred dollars in putting the building on the property would enhance the valuation of the property to a greater extent than the expenditure of a thousand dollars?

A. Yes, sir.

Q. As a matter of fact, would not it depend, to a great extent, upon how judiciously the one thousand dollars was expended in putting the building on the property? 391

A. It would, yes.

Q. If fifteen hundred dollars was squandered in putting a building on the property, it might not enhance the valuation of the property as much as if one thousand dollars were expended judiciously upon the property?

A. That is true.

Q. Would not the question be asked you depend upon a great many other conditions besides those I have mentioned, with respect to the kind and character of the buildings you put on the property with the one thousand dollars on the one hand and the fifteen hundred on the other? 392

A. It would.

Q. And as to how economically and judiciously the money was expended in each case?

A. That always has.

Q. And as to where, or on what particular part of the property the building in each case was located? A. Yes.

Q. And are there not other conditions that you, as a man of ordinary intelligence, outside of being a real estate expert, can think of which you have to know before you could give a proper answer to the question Mr. Barnes asked? 393

A. I would have to know all this, yes.

Q. All the surrounding facts before you could come to a proper conclusion?

A. Of course, I would.

Recross-examination—By Mr. Barnes:

Q. When I asked you that question do you remember that I said a building that was suitable and adequate?

394 A. Yes, sir.

Q. What do you think I meant by a building that was suitable and adequate? What did you mean?

A. I meant a building suitable and adequate, the property it is put on and the use to which it is put.

Q. And if the money had been squandered in the erection of a building, would you consider that suitable and adequate for the property?

A. It might be.

Q. You think it might be although the money was squandered?

A. They might squander enough to build four houses and get a good one at last; they might get a building suitable and adequate.

395

Adjourned at 1 o'clock; recess until 2 o'clock.

396

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT—NEW YORK COUNTY.

397

In the Matter

of

The Application and Petition of
JOHN A. BENSEL, CHARLES N.
CHADWICK and CHARLES A.
SHAW, constituting the Board
of Water Supply of the City
of New York, to acquire real
estate for and on behalf of the
City of New York, under
Chapter 724 of the Laws of
1905, and the Acts amendatory
thereof, in the Town of
Hurley, County of Ulster, New
York, for the purpose of providing an additional supply of
pure and wholesome water for
the use of the City of New
York.

398

Ashokan
Reservoir,
Section No. 15,
Parcel No. 733.

WILLIAM SAGE, JR.,
Claimant,

399

vs.

THE CITY OF NEW YORK,
Petitioner.

New York City, N. Y., Feb. 21, 1911.

The Commission convened at 2 P. M., pursuant to adjournment, at Room 700, No. 47 Cedar Street, New York City.

- 400 Present—Hon. GEORGE E. WELLER, Chairman.
 Hon. FRED H. PARKER,
 Hon. GEORGE W. BATTEN,
 Commissioners of Appraisal.

APPEARANCES:

ARTHUR S. BARNES, Esq., for the Corporation Counsel of the City of New York.
 EDWARD A. ALEXANDER, Esq., for claimant, William Sage, Jr., in *re* Parcel No. 733.

401

EDWIN BURHANS, called as a witness for the claimant, and being first duly sworn by the Chairman of the Commission, testified as follows in regard to Parcel No. 733:

Direct-examination—By Mr. Alexander:

Q. Where do you reside, Mr. Burhans?

A. City of Kingston.

Q. How long have you lived there?

A. The last four years.

Q. Prior to that time, you lived where?

A. Brown Station.

402 Q. In a house overlooking the Ashokan Reservoir site?

A. Yes.

Q. And what is your business?

A. State game protector, land appraiser, real estate agent, and expert on real estate.

Q. Expert witness?

A. Yes.

Q. Are you familiar with Parcel No. 735, Section 15, known as the Sacks' property?

A. I am.

Q. Have you known it a great many years?

A. I have; I bought timber off of it.

403

Q. Right off this same property?

A. Yes, sir.

Q. What kind of timber?

A. Pulp wood.

Q. You have heard the property described, have you not?

A. I have.

Q. Was there much timber on this property at the time the City took title to it?

A. Well, not a great deal.

Q. How much was there, if any?

A. There was seventy-three large pine trees, one chestnut.

404

Q. Large chestnut tree or small?

A. Large.

Q. Not horse chestnut?

A. No. Seven large oak, then there was about thirty small oak for making fenders and railroad ties; then there was thirty, twenty-five foot oak piles; one hundred and seventy-five cords of pulp firewood, and twenty-five cords of pulp wood, and quite a number of young hickory and young oaks on the upper end of the pasture land.

Q. Suitable for merchantable purposes?

A. Well, it would not pay, their growing into money faster; would not pay to cut them now.

Q. Have you had any experience in estimating the value of timber such as that you described on this property?

405

A. I have.

Q. Tell the Commission what experience you have had in that line?

A. I bought timber when I had the pulp mill, a great many timber lots.

Q. Of course, when you say you had a pulp mill, you don't mean you owned it?

A. I did own it.

Q. When you owned it?

- 406 A. Yes—we took the soft woods and sold the hard woods.
- Q. From this property?
- A. No, the property around through that section.
- Q. You had bought some?
- A. Yes, I bought some pine timber off of this, from this property, and then after the Dupons (?) bought off this property I was the timber agent for about four years, bought all the timber for them.
- Q. What was that timber used for?
- A. Dry wood pulp.
- Q. What was the pulp used for?
- 407 A. Manufacturing paper, dynamite, buttons, oil cloth, door knobs, mouldings, that is all. And then, for the State of New York—when they had an offer for land, meaning land, timber land, to sell, they would send me to appraise it before buying it.
- Q. What kind of timber land?
- A. Mountain land.
- Q. Similar to this Sacks' land?
- A. No.
- Q. Was there a growth of wood on any of it, similar to this wood?
- A. The wood would be, but not farm property, although I have appraised some farm properties the State has bought.
- 408 Q. In your opinion, what was the fair and reasonable market value of the timber you found upon this property at or about the time the City of New York took title?
- A. \$5,037.80.
- Q. Have you had any experience as a builder?
- A. As a builder?
- Q. Yes?
- A. Yes.
- Q. And in making an estimate of the structural value of buildings?

A. Well, I built a number of buildings for myself, and I knew what they cost after I got done. 409

Q. Well, now, you have had experience in buying and selling properties in the immediate vicinity of the Sacks' property, have you not?

A. Yes. I have bought and sold properties in that immediate vicinity.

Q. Can you mention some of those you bought and sold?

A. The Strathan farm, I sold that, and through me it was sold to a New York party, Fred Edgar; and the Herman property, I bought that from William Lasher for Herman. The property the railroad bought, I sold that from my sister-in-law, Tine Lasher. That is all right along there. 410

Q. You have testified as an expert in favor of claimants in these proceedings?

A. I have.

Q. And you have testified as an expert to the fair and reasonable market value of various parcels of property forming parts of the Ashokan reservoir site?

A. Yes, sir.

Q. You are not competent, are you, to testify to the reservoir element of value on any of this property?

A. I am not.

Q. On this particular parcel in question is there a quarry? 411

A. There is.

Q. Will you point out to the Commission on sheet No. 85, of a copy of the official map prepared by the City of New York, where such a quarry is indicated?

A. (Pointing.) That is the place.

Q. Will you mark that?

A. (Witness marks with letter "Q" for quarry.)

Q. Are you familiar with the official map of the City of New York?

412 A. I am; I marked that myself.

Q. Does it usually indicate quarries by a mark like that?

A. Yes, sir.

Q. Have you had any experience in valuing quarries?

A. No.

Q. You are not competent to give any testimony concerning the value of this quarry upon the property?

A. No.

413 Q. Excluding the reservoir element and the quarry element of value in this property, and valuing the property as a farm, and for farming purposes, what, in your opinion, is its fair and reasonable market value, at or about the time the City of New York took title?

A. \$14,112.

Q. Will you state to the Commission how that total is made up?

A. House, \$2,800; smoke house, \$25; toilet, \$25—

Q. (Interrupting.) That is twenty-five dollars?

A. Yes.

A. (Continued.) Barn and additions, \$1800; granery, \$200; hog pen, \$75; timber, \$537.80; land, \$8,650.

414

Commissioner Batten: Eight thousand, six hundred and fifty dollars?

The Witness: Yes, sir.

Q. What can you say with respect to the location of this property, Mr. Burhans?

A. Good, first-rate; right almost across the highway was a large boarding-house that could accommodate at least one hundred people, and just—

Q. (Interrupting.) To whom did that belong?

A. To Ridder (Continuing.) And just above there was three or four other boarding houses, so

it made a good market for produce, butter, milk and eggs, chickens. **415**

Q. Mr. William Sacks owned the property for a great many years, did he not?

A. Yes.

Q. He was a very old man, was he not?

A. Yes, sir.

Q. Do you know whether or not, to your personal knowledge, he had been actively engaged in operating this farm?

A. Well, no, he went mostly in the chicken business and to the milk and butter.

Q. Did he sell chickens, milk, butter and eggs to the surrounding boarding houses? **416**

A. Yes, sir.

Q. Making a living that way?

A. Yes, sir, and then he would sell hay after winding up all his stock.

Q. That was grown on this land?

A. Yes.

Q. In making your estimate of value, did you divide the property into different classes, specifying how many acres of tillable and pasture and other kinds?

A. Forty acres of tillable land, twenty acres pasture, ten acres of orchard, and tillable, sixteen and a half acres of woods and pasture.

Q. Did you average it through at so much per acre, or place different valuations—or did you place a different valuation on the tillable, orchard and pasture, and strike an average? **417**

A. Took it one hundred dollars per acre, right through.

Q. As a fair average?

A. Yes.

Q. Which, in your opinion, would be more valuable—the orchard or the tillable land?

A. Why, the orchard would be.

418

Q. How many trees were there in the orchard?

A. Twenty-five apple, two cherry, four pear, one apricot, twelve plum.

Q. Did you count the trees?

A. I did.

Q. Have you any idea of the age of any of those trees?

A. No, I have not here; I did mark that in my book.

Q. Are they all fruit-producing trees?

A. Yes, and all in good condition, too.

Q. Would they constitute a source of income to this farm?

419

A. They certainly would.

Q. What would you say was the chief source of income to the owner of the farm, in your opinion, from what you saw?

A. The chickens and the milk and butter.

Q. Had he, to your personal knowledge, raised anything on the tillable land?

Chairman: If you know.

A. Only hay.

Q. Did he pasture many cattle on this property at any time, if you know?

A. He had five or six cows himself.

420

Q. Did he pasture for other people?

A. Not that I know of.

Q. Has this property any considerable frontage on a public highway?

A. I didn't measure that. There is one hundred and twenty-five feet of panel and wire fence in front of the house.

Q. When you say "panel," do you mean wooden?

A. Wooden, paneled with wire.

Q. Have you any idea of the cost of construction of that fence?

A. Well, I should judge, for the fence at least, cost twenty-five dollars to build it.

Q. As cheaply as that up there?

A. Yes.

Q. Are there stone fences throughout the property?

A. Yes, sir.

Q. They have been described by one of the witnesses

A. Yes, sir.

Q. A good well, which has been described?

A. Yes.

Q. Two good springs?

A. Never failing springs. I inquired regarding the springs, and they told me that they had never known them to go dry.

Q. Will you describe these springs to the best of your ability?

A. There was one at the north end of the farm, in the pasture lot, with a spring, I should judge, about two feet across, and it was the head of a small brook that ran down through this farm; and the south end of the farm, in the pasture lot, was another spring where the stock could go right direct from the barnyard to drink, very handy.

Q. Were those springs exclusively on the property of Mr. Sacks?

A. They were; I marked them on the map.

Q. Will you indicate on this map where those springs are?

A. (Indicating springs on map.)

Q. Did you place a valuation upon the buildings and improvements upon this property?

A. I did, yes.

Q. Did that valuation include any valuation for fences, well and springs upon the property, or exclusive of that?

A. No, I considered the water, well, springs, fences, the trees, fruit; there was a number of fruit trees of hickory; I think there was ten hickory fruit trees.

421

422

423

424 Q. You mean hickory nut trees?

A. It is considered a fruit tree, a hickory nut and a chestnut.

Q. Will those hickory trees, in your opinion, yield considerable fruit?

A. Yes.

Q. What are the size of those trees?

A. About eight and ten inches in diameter.

Q. How much in circumference, about?

A. About three times that.

Q. Can you state anything else, either to the advantage or disadvantage of the property that you have not already stated?

425 A. Well, they have free delivery through there; don't have to go after the mail; the post office is only a quarter of a mile from there, church and schoolhouse, blacksmith shop; the grist mill was about four miles from there.

Cross-examination—By Mr. Barnes:

Q. In the last question you were asked if you knew of any other facts to the advantage or disadvantage of the property—which you did consider advantages and which disadvantages?

A. I considered everything an advantage.

Q. Do you consider free delivery an advantage?

426 A. Yes, sir.

Q. Then the church, is that an advantage?

A. Yes.

Q. The school an advantage?

A. Yes, sir.

Q. Blacksmith shop?

A. Yes, sir.

Q. You didn't name any disadvantages?

A. Didn't know of any.

Q. Don't know of a thing that would detract from the value in any way?

A. No.

Q. Rather a remarkable farm, isn't it?

427

A. Yes, sir.

Q. You have known of a great many farms and don't know of anything to criticise on this one?

A. No.

Q. Suppose you went to buy that farm, Mr. Burhans?

A. Why, when I went there to appraise it I went exactly the same as though to buy it.

Q. You saw just the same things as though you were going to buy it?

A. Yes.

Q. You would not know of anything to state to the owner as to why you should not pay the amount he asked? 428

A. I would not.

Q. Now, you stated that you had the size of these trees in your notebook, or the age of the trees?

A. Yes.

Q. And you have not that notebook with you?

A. No.

Q. What is this you are testifying from, the paper.

A. The number of trees I copied off so I would have them.

Q. You got that from your notebook?

A. Yes.

Q. What was that, a pocket notebook? 429

A. Yes.

Q. You made your original entries in that notebook?

A. Yes.

Q. And copied it at length in this paper?

A. Yes.

Q. For the purpose of testifying?

A. Yes. Was afraid I might have my pocket picked on the boat.

Q. You didn't want to lose it?

A. No.

430 Q. When you examined this property were you alone?

A. No, well, when I took the timber I was alone; went on a Sunday and did that; went through and took all the timber, but when I went over the farm the rest of the boys were along.

Q. Did you talk over valuations with them?

A. Why, some would say that is worth so much—I didn't pay any particular attention to what they did say.

Q. As soon as they said it was worth twelve thousand dollars, did you say it is worth fourteen thousand dollars?

431 A. No.

Q. Did you make any effort to convince them your figures were right?

A. No.

Q. You don't think they know much about the valuation of land, do you?

A. Well, maybe they didn't go over it as carefully as what I did.

Q. Did you describe what you found on this farm?

A. No.

Q. You heard them describe it?

A. Yes.

432 Q. Did they include everything you found?

A. Well, they forgot about the fence in front.

Q. Nor didn't have the fruit chestnut or hickory?

A. Don't know whether they knew it was fruit trees or not.

Q. So that if they were examining it for the purpose of buying, they did not examine it very carefully?

A. They may have thought so.

Q. What do you think about it?

A. I am not here to criticise their work.

Q. You don't call a man a real estate expert if he don't describe all the things on the place?

A. If I sent them I would want them to look at everything they could find. 438

Q. Did you know Mr. Sacks?

A. Yes, but am not personally acquainted with him.

Q. When did you buy the timber from him?

A. It was quite a number of years ago.

Q. Does he still own the property? Did he own it at the time the City took it?

A. I don't think so.

Q. Do you know so?

A. Yep.

Q. Know when he sold it?

A. Well, not exactly, no.

Q. Do you know about the time? 434

A. Well, it was somewheres before the City came up there.

Q. What do you mean by that?

A. Before they came up and condemned it.

Q. You mean it was prior to the time the City owned it?

Mr. Aleexander: He didn't say that.

A. I said he sold it before the City condemned it.

Q. Know who he sold it to?

A. My brother.

Q. What is your brother's name?

A. Frank. 435

The Chairman: Frank Burhans?

The Witness: Yes.

Q. Do you know Mr. DeLee?

A. No.

Q. You don't know he sold it to Mr. DeLee?

A. I don't.

Q. What makes you think he sold it to your brother?

436

A. I heard someone say so.

Q. Who was it.

A. I cannot say.

Q. Was it your brother?

A. No, I heard it outside.

Q. Do you know how much your brother paid for it?

A. No.

Q. Did you ask him?

A. I asked him and he told me "none of my business."

Q. Does your brother still own it?

A. That I cannot say.

437

Q. Know who the claimant is in this proceeding?

A. I do not.

Q. Who employed you?

A. Mr. Alexander.

Q. Do you keep yourself informed as to real estate transactions in this section?

A. Watch awards pretty carefully made by the City.

Q. Do you keep yourself informed as to real estate transactions in this locality?

A. Well, Mr. Barnes, that is the only property sold in that locality, is what the City has bought.

Q. That is the only sale you know of?

A. Yes.

438

Q. You make the statement to the Commission that the only property that has changed hands is this property acquired by the City?

A. Yes.

Mr. Alexander: You mean in this immediate locality?

The Witness: Yes.

Q. Prior to the time the City took title for five years, does that same statement apply?

A. There was but very little property sold anywhere through that section.

Q. Not much of a demand?

439

A. They would not sell it.

Q. Have you ever tried to buy a piece of property that they would not sell?

A. Yes, sir.

Q. When was that?

A. Of John Garden when I owned the pulp mill. I tried to buy his farm, but he would not sell it at any price.

Q. Did you give him a price?

A. I didn't—yes, for one part of it; he would not sell and I thought I could buy the part next of my house; there is a plot of seven acres and I offered him one thousand dollars for that.

440

Chairman: By a "plot" you mean for a parcel of land?

The Witness: Yes.

Q. Is that upon which you base your opinion of valuation in this instance?

A. I had not thought of that.

Q. In your opinion as a real estate expert, does the selling price of a piece of property indicate the value of that property to you?

A. Not always.

Q. Not always?

A. No.

Q. Have you made any inquiries of any source other than that of your brother, as to the purchase price of this property?

441

A. I have not.

Q. You don't know a man named Sage owns it?

A. I do not.

Q. Know this proceeding was in the United States Court?

A. I do not.

Q. Know other proceedings were in the State Court?

A. That I did not know.

442 Q. You do not know that other parcels in Section 15 which were sold were tried in the New York State Courts?

A. That I do not know.

Q. You didn't know that?

A. No.

Q. What is this price that you have testified to here; this amount?

A. The value of the farm.

Q. Is that the fair market value of the property at the time the City took title?

A. I would say so.

Q. What do you mean by fair market value?

443 A. Why, between the willing buyer and willing seller.

Q. What between a willing buyer and willing seller?

A. The time I put on their market value; market value is between a willing buyer and a willing seller—do you want to know what I think market value is?

Q. Yes.

A. Why, market value really is, supply and demand.

Redirect-examination—By Mr. Alexander:

444 Q. Do you know the average award made by all of the Commissions who condemned the places of the Ashokan reservoir site, so far as condemned?

A. I made a list of a few of them; that list there.

Q. You never averaged up the total awards?

A. No.

Q. Including all improvements on land?

A. No.

Q. Improved, unimproved, swamp land and all kinds?

A. No.

Q. You did make a list of some of the awards?

A. Just a few scattered around.

445

Q. Do you know what award was made on the Glynn property, thirty acres?

A. Eighteen thousand five hundred dollars.

Q. Did you know that property?

A. I did; yes, sir.

Q. That was improved property, was it not?

A. It was.

Q. Did you know the George Ennis property?

A. I did.

Q. Where is that property located?

A. Down in Stewartville.

Q. Is that farm property or village property?

A. Farm property.

Q. That property consisted of ten and one-half acres, did it not?

446

A. Yes, sir.

Q. Any buildings?

A. No buildings.

Q. And an award was made on that of thirty-eight hundred dollars, was it not?

A. Yes, sir.

Q. At the rate of \$363.32 per acre?

A. Yes, sir.

Q. Do you know the DeWitt Ballard property?

A. Yes, sir.

Q. Consisting of sixteen and one-half acres?

A. Yes, sir.

Q. Ordinary farm property?

447

A. Farm property; yes, sir.

Q. Any buildings on it?

A. Yes, sir, house and barn.

Q. That was sixteen and one-half acres?

A. Yes, sir.

Q. And an award was made on that for five thousand dollars, was it not?

A. Yes, sir.

Q. Three hundred and one and 80/100 dollars per acre?

448

Q. Yes, sir.

Q. Did you know of a sale made by George Stewart to Edward Risley?

A. Yes, sir.

Q. About twenty years ago?

A. Yes, sir.

Q. Of a quarter acre of land?

A. Yes, sir.

Q. What kind of land was that?

A. Unimproved.

Q. Was it village property or farm land?

A. Well, it was farm—part of a farm along a railroad.

449

Q. What was paid for that?

A. Seven hundred and twenty-five dollars.

Q. For a quarter of an acre?

A. Yes, sir.

Q. Was that used for any special purpose, as far as you know?

A. He went to work after he bought it and used it for a stoneyard.

Q. That is what he bought it for?

A. Yes, sir.

Q. Do you know of a sale made by one named Bonsteel to Mr. Ernest?

A. Yes, sir.

450

Q. Where was that locality?

A. West Hurley Village.

Q. How much was that sold for?

A. That was just a building lot, I forget the exact measurements; I think six hundred dollars.

Q. 60 ft. x 80 ft.?

A. Somewheres around there.

Q. Do you recall when that sale was made?

A. I think that was about eighteen years ago.

Q. What was that property sold and used for?

A. Building purposes.

Q. Village purposes?

A. It was in West Hurley Village.

Q. A great deal of other property was condemned by the City of New York, from time to time, in condemning the Ashokan reservoir site, was it not? 451

A. Yes, sir.

Q. The whole of the Ashokan reservoir site was divided up into territorial sections, was it not?

A. They were.

Q. And they were numbered from one to eighteen consecutively, were they not?

A. Yes.

Q. And each one of these Commissioners had to pass upon the value of the property and damages for the rights taken within its territorial section, did it not? 452

A. They were appointed for that purpose, yes.

Q. And as the City of New York first acquired one section of this land and then another, did the balance of the reservoir site increase or decrease in market value?

A. Well, it certainly should have increased.

Q. Do you know as a fact which way it went?

A. We didn't consider in making our valuation—didn't consider that, but there is no question but what the last parcel was worth a great deal more than the first.

Q. Was that on account of the awards that were made by the Commissioners who were first appointed? 453

A. On account of that and also on account of all around there, on the outskirts of the reservoir the property advanced two hundred per cent. more in price.

Q. After the City of New York had acquired title to the first section of this property the owners who owned the balance of this reservoir site knew that their property was to be taken for reservoir purposes, did they not?

A. They did.

454 Q. And held it at a higher price, did they not?

A. Yes, sir.

Recross-examination—By Mr. Barnes:

Q. Now, you stated on your direct-examination, Mr. Burhans, that you had not considered the reservoir's adaptability in your valuation?

A. No, I did not.

Q. You mean to say you did not say that, or didn't consider it?

A. I didn't consider it.

Q. But you valued the entire farm?

A. Yes.

455 Q. And the buildings?

A. Yes.

Q. And the fences?

A. Yes, sir.

Q. Trees?

A. Yes, sir.

Q. Everything, except the quarry?

A. No, sir.

Q. And you said that your valuation was not based upon these certain awards that you testified that you knew of?

A. No.

456 Q. And that some time prior to the time the City acquired title there had not been any transfers in this section to speak of?

A. There wasn't.

Q. You didn't know of the transfer of this very property?

A. No, I did not know of that.

Q. Or the price paid for it?

A. No, I didn't.

Q. That you inquired of your brother who said it was none of your business?

A. Yes, sir, and I examined the property a short time after that, and I said if he gave over fifteen thousand dollars for it he got stung. 457

Q. Didn't he then tell you what he paid for it?

A. No, he kind of grinned.

Q. That didn't look as though he were stung?

A. No.

Mr. Alexander: That is going pretty far.

Chairman: The attorney for claimant requests adjournment to fulfill engagement which he has at District Attorney's office; therefore, adjourned until 10 o'clock tomorrow, Wednesday morning, and the entire Commission requests counsel to be prompt so that we may get going early and finish early, it being a holiday. 458

Adjourned to Wednesday, February 22, 1911, at 10 o'clock.

460

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT, NEW YORK COUNTY.

In the Matter

of

461

The Application and Petition of
JOHN A. BENSEL, CHARLES N.
CHADWICK and CHARLES A.
SHAW, constituting the Board
of Water Supply of the City of
New York, to acquire real es-
tate for and on behalf of the
City of New York, under Chap-
ter 724 of the Laws of 1905,
and the Acts amendatory there-
of, in the Town of Hurley,
County of Ulster, New
York, for the purpose of pro-
viding an additional supply of
pure and wholesome water for
the use of the City of New
York.

Ashokan
Reservoir,
Section No. 15,
Parcel No. 733.

462

WILLIAM SAGE, JR.,
Claimant,

vs.

THE CITY OF NEW YORK,

New York City, Feb. 22, 1911.

The Commission convened at 10 o'clock A. M.,
pursuant to adjournment, at Room 700, No. 47
Cedar Street, New York City.

Present—Hon. GEORGE E. WELLER, Chairman,
 Hon. FRED H. PARKER,
 Hon. GEORGE W. BATTEN,
 Commissioners of Appraisal.

463

APPEARANCES:

ARTHUR S. BARNES, Esq., for the Corporation Counsel of the City of New York.
 EDWARD A. ALEXANDER, Esq., for Claimant, William Sage, Jr., *in re* Parcel No. 733.

Mr. Alexander: Mr. Frank Burhans would have been here, but his wife is sick with consumption and he is at Pine Island. In order to save time I will read his testimony as to what the City of Kingston did.

464

WALTER LEE, called as a witness for claimant and being first duly sworn by the Chairman of the Commission, testifies as follows in regard to Parcel No. 733:

Direct-examination—By Mr. Alexander:

Q. Where do you live, Mr. Lee?

465

A. Live in Kingston, now, but most of my life I have lived at Glenford.

Q. Are you familiar with Parcel No. 733, Section 15, known as the Sacks' property?

A. I am.

Q. How long have you been familiar with the property?

A. All my life, since I was able to remember.

Q. Quite a few years?

A. Yes, I am forty-five years old.

466 Q. Do you know William Sacks?

A. I do.

Q. He is living yet?

A. He is.

Q. And he owned the property for a great many years?

A. He did.

Q. And lived upon it?

A. He did.

Q. Worked it?

A. He did.

Q. Know whether he ever worked the quarry on the property?

467 A. Yes, the owner worked it about from ten to twelve years ago and the son worked it a little; took out some stone.

Q. Anybody before then?

A. Yes, years before I can remember, but I remember about eight or ten or twelve years ago when his son Fred worked some there.

Q. Where was the stone that was taken out of that quarry sold?

A. Took it over to Kingston, to Wilbur. Wilbur is a part of the City of Kingston.

Q. How was the stone taken from the quarry to Wilbur?

A. On a wagon.

468 Q. Carted down there?

A. Yes, sir.

Q. I suppose the quarry was worked in the good old fashioned way, by hand?

A. It was.

Q. Never worked it by the use of any modern machinery?

A. They did not.

Q. Do you know how long a period of time he actually worked the quarry?

A. The majority of it was worked before I can remember; he only worked it, took out the second block I speak of. 469

Q. Do you know whether he sold it at a profit, or don't you know the circumstances?

A. I do not know.

Q. What is your business?

A. Well, for the last year I have not been in business; I have been building a couple of houses.

Q. You have been an expert witness during the last year?

A. Yes.

Q. Have you testified as a quarry expert?

A. I have.

Q. On whose behalf? 470

A. Claimants'.

Q. What was your business prior to a year ago, particularly?

A. Speculating in cattle.

Q. Did you buy and sell any quarries?

A. I have.

Q. State to the Commission at length what your qualifications are as a quarry expert?

A. Well, I have—I spent ten or twelve years working at the business and all that time made a business of it—

Chairman: Business of examining quarries? 471

The Witness: No, not examining quarries.

Q. Of what?

A. Working quarries.

Q. Did you own these quarries that you worked or did you work them on a rental basis?

A. Most of them I had to buy; buy one block at a time; not many who have quarries will rent them at 5% rental; in order to get them, nine-tenths of those I have worked I had to buy one block at a time in a small chump.

472 Q. A block of stone in the quarry?

A. Yes, that is what I mean.

Q. Then your business has been, if you thought a quarry looked as though you could make a profit, you would buy a block?

A. Yes, sir. At the same time they would not rent you a quarry; I found that nine-tenths of the time if they were any good at all they would not rent one; you would have to buy a block.

Q. Would they rent you a quarry for more than 5%?

A. I never have, but I bought them by the block; I never had anyone ask me more than 5%.

473 Q. Do you know anything about the rental of quarries about the reservoir site section?

A. I do.

Q. Were there many rentals throughout the entire section?

A. Yes, sir.

Q. Most of them on a royalty basis from 5% to 10%?

A. Yes, sir.

Q. Depending upon the size of the quarry?

A. Yes; I have paid as much as 10% where I have bought the block.

Q. But most of them are 5%?

A. Where you can get them at all.

474 Q. Have you actually quarried those quarries that you bought?

A. I have.

Q. Actually sold the stone in the market yourself??

A. Yes, sir.

Q. Have you ever bought and quarried any quarries within the immediate vicinity of this particular property, Parcel 733?

A. Yes, near to it.

Q. How far away from this property?

A. About one mile.

Q. You worked that quarry?

A. I did.

Q. In what market did you sell that stone?

A. To Wilbur.

Q. Was that quarry more conveniently located to Wilbur than this parcel?

A. Not so far away.

Q. Did you make a profit out of that?

A. I did.

Q. Did you carefully examine the quarry on Parcel 733 for the purpose of estimating its value and testifying as a witness here to its valuation?

A. I did.

Q. Will you describe that quarry to the Commission as you found it?

A. There is three hundred feet front of it and seventy-five feet deep, that makes twenty-two thousand five hundred square feet, four foot bed, making ninety thousand cubic feet; one-third off for waste, leaving a balance of sixty thousand cubic feet, multiplying that by forty-eight cents per cubic foot would make twenty-eight thousand eight hundred dollars; five per cent. rental would amount to fourteen hundred and forty dollars.

The Chairman: That was the reasonable rental of that quarry?

The Witness: Yes.

Q. What was the quality of the stone?

A. None better.

Q. Of course, it was a blue stone?

A. Yes, sir.

Q. What kind of blue stone, flagging or curbing?

A. All flagging.

Q. Was there a ready market and demand for flagging?

A. There certainly is.

Q. Was there a demand at the time the City took title, about May 22, 1909?

475

476

477

478

A. There was.

Q. Do you know what the price, per cubic foot, of blue-stone flagging was at Wilbur?

A. I do.

Q. What was it?

A. It averaged up from 48 cents; I have seven or eight marked down; the price on the regular would be 48 cents.

Q. What do you mean by regular?

A. Where the quarry is thick; after 6 inches thick we call it regular.

Q. What is that used for?

A. Planing purposes and mill work.

479

Q. But that is not what you call flagging, is it?

A. No.

Q. Although there is sometimes pretty thick flagging, isn't there?

A. Yes, sir, about 3-inch jointers are the thickest flagging there is.

Q. Will you describe the quality, in detail, of this flagstone you found there?

A. Well, I say there is no better quality; could not be any better.

Q. What were about the sizes of the flags that could be taken out of that?

A. You could take any size.

480

Q. Could the quarry be more easily worked on account of its being opened?

A. It could.

Q. Did you place upon this quarry a fair and reasonable market value as between a willing buyer and willing seller?

A. Yes, sir.

Q. What do you consider to be the fair and reasonable market value on or about May 22, 1909?

A. \$1440.

Cross-examination—By Mr. Barnes:

481

Q. You say you worked a quarry near this one?

A. Yes.

Q. And sold the stone in Wilbur?

A. Yes.

Q. How much did you sell it for?

A. I cannot remember; it is quite some time ago.

Q. You testified you made a profit, didn't you?

A. Yes, sir.

Q. On what do you base that statement?

A. I could tell what I got.

Q. How much did you make out of it?

A. I cannot tell.

482

Q. How then can you testify that you made a profit?

A. I know I did.

Q. You don't know whether it was one dollar or two dollars?

A. I do not.

Q. When was it you sold it?

A. Ten or twelve years ago.

Mr. Alexander: Sold the quarry or the stone?

The Witness: The stone.

Q. So you base your testimony to this Commission that you made a profit on that stone, merely on the fact that you remember you did make a little money?

483

A. I do.

Q. Did you work the quarry yourself?

A. I did.

Q. What is your basis of computation, the amount you paid for it?

A. No, the amount over and above wages.

Q. How much did you charge against yourself, your own services, for wages?

- 484 A. I cannot tell.
 Q. How do you know you made a profit?
 A. I remember I did.
 Q. What do you remember you made?
 A. I don't remember.
 Q. How, then, do you remember you made a profit?
 A. Well, I know I did.
 Q. How do you know?
 A. I remember that part of it.
 Q. Do you remember whether you sold any stone?
 A. I do.
 Q. How much stone did you sell?
 485 A. I couldn't tell if it were only last year, so I couldn't tell in ten or twelve years.
 Q. What year was it?
 A. I couldn't tell you that.
 Q. Did you ever work it?
 A. I did.
 Q. What year?
 A. I told you about that.
 Q. Do you mean you don't know?
 A. I don't know.
 Q. Then you have not told me?
 A. No, I don't know.
 Q. Did you get 48 cents a foot?
 A. Yes, sir, or more.
 486 Q. Get more?
 A. On some stone.
 Q. How long did you work this quarry?
 A. Two or three years.

Redirect-examination—By Mr. Alexander:

- Q. What did you do with that quarry?
 A. I worked it until it was worked out.

VIRGIL H. WINCHELL, called as a witness for the claimant, and being first duly sworn by the Chairman of the Commission, testifies as follows in regard to Parcel No. 733: 487

Direct-examination—By Mr. Alexander:

Q. Mr. Winchell, where do you live?

A. West Shokan.

Q. How long have you lived there?

A. Well, off and on about twenty years, just in that immediate vicinity; have always lived near there, except a few years when I was away; always back and forth.

Q. What has your business been up there? 488

A. Farmer.

Q. For a time you were on the police force, weren't you?

A. I was.

Q. You have had a varied experience, more or less, have you not?

A. Yes.

Q. Have also been an expert witness?

A. Yes, sir.

Q. For claimants?

A. I have.

Q. Are you familiar with farms and their values throughout the Ashokan Reservoir section? 489

A. Somewhat.

Q. You have bought and sold farms?

A. Well, I bought and sold some property there.

Q. Have you kept track of the awards made by the different Commissions appointed by the City of New York?

A. I have looked them up, but have not really kept a record of them.

Q. Have you, since you started to testify as a witness for your information, from time to time?

A. I have.

490 Q. Concerning the valuation of farms in the reservoir site?

A. I have.

Q. Did you examine Parcel No. 733, Section 15?

A. I did.

Q. You have heard the property described here by a number of the witnesses?

A. I did.

Q. Heard Mr. Edwin Burhans describe it?

A. Yes, sir.

Q. Was his description of it accurate?

A. Practically, yes.

Q. Is there a fence in front of the property?

491 A. There is.

Q. Are these stone fences described, upon the property?

A. They are.

Q. The well?

A. It is.

Q. All the buildings and other improvements?

A. Yes, sir.

Q. And orchard?

A. Yes, sir.

Q. Shade trees?

A. Yes, sir.

Q. Timber?

A. Yes, sir.

492 Q. And quarry?

A. Yes, sir.

Q. You are not a quarry expert?

A. I am not.

Q. Don't know anything whatever about the valuation for reservoir purposes?

A. I do not.

Q. You are testifying simply and solely for farming purposes, for its use as a farm, and exclusive of the value of the quarry upon it?

A. Yes, sir.

Q. What, in your opinion, was the fair and reasonable market value of the property on or about May 22, 1909? 493

A. Twelve thousand dollars.

Q. What, in your opinion was the fair and reasonable market value of the buildings and structures upon the property; structural value?

A. Five thoueand one hundred and seventy-five dollars.

Chairman: Buildings, how much?

The Witness: Five thousand one hundred and seventy-five dollars.

Q. When you say that is the value of those buildings upon the property, did you, or did you not, include in that valuation any of the fences, the well, and things of that kind? 494

A. I considered those.

Q. You didn't listen to the question—did you include in that valuation of five thousand one hundred and seventy-five dollars, the value of those fences and water?

A. No.

Q. In that valuation you considered merely the value of the buildings?

A. I did.

Q. Including the house, barn, hennery and other buildings described here? 495

A. Including the hennery, grainery, house, smoke house and various buildings.

Q. Have you had any experience in valuing the cost of buildings?

A. I have done quite a little of it myself.

Q. Actual valuing of the cost of construction of buildings?

A. I have.

Q. In making this valuation of the buildings at five thousand one hundred and seventy-five dollars, did you allow for any depreciation?

496

A. I considered them as they stood.

Q. At the present time?

A. At the time the City acquired title.

Q. In your opinion, did these buildings enhance the value of the land at least to the extent of their structural value?

A. I considered they did.

Q. Suitable for the farm and suitable for the locality?

A. They are.

Q. What valuation did you place upon the land exclusive of the buildings?

A. Six thousand nine hundred and twenty dollars.

497

Q. How did you arrive at that valuation?

A. At an average of eighty dollars per acre.

Q. Including the enhancements, fruits, fences, water, &c.?

A. Yes.

Q. You didn't figure up specially how much the fence and stone fences and well and timber and shade trees and orchard enhanced the value of the land?

A. I did not.

Q. Just averaged it up at about eighty dollars per acre?

498

A. I did.

Q. In your opinion, at or about the time the City of New York took title, is that the price that a willing purchaser should have been willing to have paid for the property to the seller who was willing to sell?

A. I consider so.

Q. Consider that to be a fair and reasonable price for the property?

A. I do.

Cross-examination—By Mr. Barnes:

499

Q. Is that opinion your own, Mr. Winchell?

A. It is my own.

Q. Based on any fact?

A. Based on my judgment.

Q. Is your judgment based on a fact?

A. Well, what do you mean by that?

Q. Was it based on a fact?

A. It is based on the value of property throughout that section.

Q. How did you acquire that knowledge?

A. What I know of the production of property. I have worked it for a great many years.

Q. Based on the actual sale of any property?

500

A. Not particularly in that immediate section.

Q. Do you know who owns this property now?

A. I do not.

Q. Who employed you?

A. Mr. Alexander.

Q. You don't know the name of the present owner?

A. I do not.

Q. Know when Mr. Sacks owned it?

A. I knew the property at that time.

Q. Does he own it still?

A. I have heard not.

Q. Who did you hear owns it?

501

A. I didn't hear; I heard it was sold. I did hear somebody talk it over, that it was bought by Mr. Frank Burhans.

Q. Did you make any investigation to find out?

A. I didn't.

Q. In your opinion, if you had known of the selling price of this property would it have aided you in measuring—in fixing the market value?

A. I think not.

Q. As a matter of fact, you would not pay any attention to sales?

502

A. I would not.

Q. There are a great many pieces of property sold at ridiculous prices, are there not?

A. No doubt.

Q. Ever heard of property sold under foreclosure?

A. I have not.

Q. And a great many sold at market price?

A. There are; I think that applies more particularly to village property; there isn't so many transfers of farm property.

Q. Is that a reason it would not sell for its market price?

503

A. Not at all.

Q. You heard Mr. Burhans testify yesterday?

A. I did.

Q. And you heard him say the property was worth fourteen thousand dollars?

A. I think that is what I understood.

Q. Did you consult with him prior to testifying?

A. I did not.

Q. You didn't know what his figure was before he testified?

A. I did not.

Q. You don't think the property is worth fourteen thousand dollars?

A. I consider it worth my figure.

504

Q. If it is worth your figure it couldn't be worth fourteen thousand dollars?

A. It might be worth that to some; I am not putting a special value on it.

Q. Is that twelve thousand dollars, in your opinion, the fair market value?

A. Yes, sir.

Q. At the time the City acquired title?

A. Yes, sir.

Q. What do you mean by fair market value?

A. What the property is worth between a willing buyer and a willing seller.

Q. You spoke about knowing of certain awards that have been made by different Commissions? 505

A. Yes, I have looked up awards.

Q. You have testified on a great many parcels, you say?

A. Quite a good many.

Q. Can you cite a single instance where the City has given an award in the same figures you testified to? For instance, you go on the stand and say the property is worth so much money?

A. I cannot recall, no; in some instances they have been pretty near.

Q. Can you tell us one instance?

A. I could not recall any.

Q. Still you know it is a fact? 506

A. Yes.

Q. When did you look it up last?

A. Not in some time.

Q. What particular property have you testified on?

A. I can recall a number.

Q. Do you recall the Commission that made awards near your figures?

A. I do not recall them. I did not make any note of it at the time; we read those things over as published daily.

Q. Did you consider that the price that the Commission fixed as the market price of that property? 507

A. In their judgment, no doubt.

Q. So that in your judgment it was worth a higher figure; you didn't agree with their market price?

A. No, mine didn't agree with theirs.

Q. But that didn't alter your judgment any?

A. No.

Q. As a matter of fact, these different awards in the reservoir section didn't influence you in fixing your valuation in this instance?

508

A. I don't think so.

Q. Wasn't governed by them in making—didn't help you on this particular property?

A. No.

Q. What particular awards did you have in mind?

A. The different awards that have been made as I have read them over.

Q. Did you have them specifically in mind?

A. No.

Q. You simply had in mind the fact that awards had been made?

A. No.

509

Q. No special amount?

A. No.

Q. But you knew they were pretty near on an average what you testified to, didn't you?

A. Well, somewhat, yes.

Q. You don't know much about that?

A. It is very hard to retain all those things in your memory. If I had made a lot of notes I could remember better.

Q. You examined this property, didn't you?

A. I certainly did.

Q. Who was with you?

A. Mr. Sacks, Mr. Van Kleeck.

Q. Who else?

510

A. No one with me.

Q. They all testified the same figure you did?

A. Our figures vary. If I gave the amount I got, it was twelve thousand and ninety-five dollars; and if you want the price on each building I will give that.

Q. What I want to know is the price—as to why you came down to twelve thousand dollars?

A. Well, I really couldn't say that; that was a good fair market price.

Q. You knew that twelve thousand and ninety-five dollars was a good price, didn't you?

A. Yes, but I didn't stand; in disposing of a farm a man would not stand on a few dollars one way or the other. 511

Q. That is the reason why you knocked off that ninety-five dollars?

A. Yes, because I consider it a fair market price, worth the money. In adding, in making up my values on that, it amounts to ninety-five dollars more.

Q. In reference to this particular farm, you don't know that a man named Sage owns it, and is claimant in this action?

A. I do not.

Q. Did you know that Mr. Sacks sold to a man named DeLee? 512

A. I did not.

Q. Know DeLee sold to Burhans?

A. I do not.

Q. And that Burhans sold it to Mr. Sage?

A. I do not; all I have heard is what I have heard since here.

Q. You never asked Mr. Burhans whether he owned the property?

A. No.

Q. Ever ask Mr. Sacks?

A. No.

Q. Do you know Mr. Sacks?

A. Not very well; I have not seen him in some time. 513

Q. There was a Mr. Sacks who testified on this case?

A. He was a nephew.

Q. Did you ask him whether his uncle sold the property?

A. I heard him say his uncle sold it.

Q. You didn't make any inquiry to determine the purchase price or selling price?

A. I did not.

514 Redirect-examination—By Mr. Alexander:

Q. Did you know that the different Commissions differed as to the valuation of similar kinds of property in their respective sections?

A. I certainly do.

Q. There was a difference of opinion, wasn't there, all along the railroad on similiar property?

A. There was.

Q. And that the only people who didn't differ as to the valuation of any property in that section was the Corporation Counsel and its assistants; they have always claimed it was worthless?

A. To a certain extent.

515 Q. Do you know whether ever any Commission has ever testified that the property was only worth as little as the valuation placed upon it by the City's witnesses?

A. Well, I think there was one Commission in particular, only one, that made any valuation as low as the City's witnesses, on one or two parcels, but the most of the awards made would average, at least, 50% more than the City's witnesses put on.

Q. Some would average almost what the claimant's witnesses put on it?

A. Some of them.

516 Q. Do you know who employed all of the City's witnesses in those proceedings; who put them on the stand?

A. I do not.

Q. Know whether it was the Corporation Counsel of the City of New York?

A. I consider so.

Q. And his assistant, Mr. Barnes, Mr. White and Mr. William McMurtrie Speer?

A. Yes.

Q. Do you know whether they paid these witnesses wholesale or retail?

A. That I do not know.

517

Chairman: How is that material?

Mr. Alexander: He has gone into a lot of stuff—he has opened the door—

Mr. Barnes: I think you have opened the door.

Q. Do you know whether these witnesses have been retained by the week, month or day, and how they are paid by the City?

A. I do not; what I know is hearsay in reference to that.

Q. Do you know anything about the character of the witnesses that the City has paid to testify?

A. No.

518

Q. Have any of them, to your knowledge, ever been considered as real estate experts prior to the time when the Corporation Counsel hired them to serve in these proceedings?

Chairman: If you know.

Q. If you know?

A. I would not say.

Q. Well, you have heard of Joe Hill, have you not?

A. I have known him for a great many years.

Q. Have you ever heard of him as being a real estate expert prior to the time the City employed him?

519

A. No.

Q. Have you ever to your knowledge—you have lived in that section?

A. I have.

Q. Heard that he had been called upon to testify in any Court, or other proceedings, as to the valuation of real estate in that section?

A. Never to my knowledge.

520 Q. You can say the same about McMiller and other witnesses in these proceedings?

A. Never to my knowledge, before the City acquired them.

Q. Many of these so-called witnesses were originally employed by Everett P. Fowler?

A. Only from hearsay.

Recross-examination—By Mr. Barnes:

Q. Prior to the time the City acquired title, have you been known as a real estate expert?

A. No.

521 Q. How about Mr. Sacks? Was he known as a real estate expert?

A. No, I think not.

Q. How about Mr. Burhans?

A. I have not known him as such.

Q. Do you know whether they testified in any judicial proceedings as to the value of real property, if you know?

A. No.

Mr. Alexander: You mean you know, or don't know?

The Witness: No, I don't know.

522 Q. You are in the same situation in regard to them as to the City's witnesses you testified about, you don't know?

A. That is my reply, not to my knowledge, as being employed.

The Chairman: Mr. Alexander requests permission to read into these minutes the testimony of Mr. Frank Burhans, given before Commission No. 6, in regard to Parcel No. 258, and there being no objection it is so ordered.

FRANK BURHANS, a witness called in behalf of the claimant, and having been first duly sworn by the Chairman of the Commission, testified in regard to Parcel No. 258 as follows: 523

(It is stipulated and agreed by and between counsel for the respective parties hereto that the testimony of this witness heretofore adduced on the trial of other causes before this Commission, in regard to his qualifications, and, in general, so far as applicable, shall apply with the same force and effect to Parcel No. 258 as if here repeated).

Q. Where do you live, Mr. Burhans? 524

A. In Kingston.

Q. You live in the City of Kingston?

A. Yes, sir.

Q. And you have for two years?

A. I have.

Q. And formerly lived at Brown's Station?

A. Yes, sir.

Q. And before living at Brown's Station you lived in the City of Kingston?

A. Yes, sir.

Mr. Brinnier: I offer in evidence a copy of the proceedings of the Common Council of the City of Kingston, and its committees, relative to obtaining a source of water supply from, at, or near Bishops' Falls, now now included in the Ashokan water shed. 525

I offer this evidence for the purpose of laying a foundation for evidence which I intend to introduce as to the adaptability, etc., of the Ashokan Reservoir district water supply, etc., and that it was in demand previous to the condemnation proceedings on be-

526

half of the City of New York. I intend to show that this demand on the part of the City of Kingston, these proceedings by the City of Kingston and the demand by the Ramapo Company increased the market value of this property as between a buyer and a seller, and I expect to prove that.

Q. Mr. Nostrand, you have had considerable experience, have you not, in the purchase of parts of different reservoir sites?

A. Yes.

527

Q. I mean, in acting as the agent for people who purchased the lands forming parts of reservoir sites?

A. I have.

Q. And in all those instances where you purchased that character of property, after it became known in the community that that property was to be used for reservoir purposes, did the price of the remaining land go up in value?

A. It has done so in some cases I know of.

Q. Can you mention some cases where, after it became known, that prices did not go up?

A. I cannot.

528

Q. And after it became known that the property formed part of a reservoir site, was to be used for water purposes, would the—from your actual experience—would the owners of the remaining land sell it for its actual farm valuation, or did they want a higher price than that?

A. In some cases they would sell it; in other cases they wanted a higher price.

Q. In the majority of cases would they?

A. That I could not say; if a man was very hard up he would be apt to dispose of his property; it depends on that; on his condition.

Q. If he were not forced to sell, in cases where you dealt with these people, did they usually want a higher price for their property under those circumstances than for ordinary farm land?

529

A. I could not say that.

Q. You could not say one way or the other?

A. That depends so much upon the particular people; many people would; it depends on the conditions governing people; if they were desirous to sell why they would then be glad to get a customer; if they did not desire to sell and concluded they would get more money by waiting, they would be apt to wait; it depends on the personality of the party owning the property.

530

Q. You have seen the Ashokan reservoir site?

A. I have.

Q. Do you consider the farms there and other lands which together compose this site, to be of greater valuation than similar farming land which does not constitute a part of a reservoir site?

A. Yes, I should so consider them.

Q. In other words, you consider that land which forms part of a reservoir site has in it an inherent element of valuation by reason of its adaptability and availability for reservoir purposes, or water supply purposes, would you not?

A. I do under certain circumstances, yes.

531

Q. Under the circumstances in this case?

A. Yes, sir.

Q. Was this particular parcel in question, or, is this particular parcel in question, a part of the Ashokan reservoir site?

A. It is.

Q. And would it necessarily have to be used in constructing the Ashokan reservoir?

A. It would.

532 Q. And without its use the reservoir could not be constructed, could it, which the City is now constructing?

A. Not unless there was a great amount of money spent to dike off this particular property.

Q. That expense would be prohibited for all practical purposes?

A. It would.

Q. For all practical purposes this particular parcel of property must necessarily be used as a part of the Ashokan reservoir site?

A. Yes.

533 Q. For the construction of the Ashokan storage reservoir?

A. Yes, sir.

Q. Have you figured out how much the City of New York saves by taking the Ashokan reservoir site in preference to any other site of water supply?

A. Not as yet.

Q. What is the next nearest available source of supply, if you know?

A. I should say the Adirondacks.

Q. And what would be the cost of constructing a water supply, to take water from the Adirondacks and deliver it to the inhabitants of New York City and to the inhabitants of other cities along the Valley of the Hudson?

534 A. Much greater than from the Esopus, because the water would have to be probably pumped.

Q. Outside of the pumping, is the distance almost double?

A. It is almost double. I have made some calculations on this but have not them here; I did not think I was to be called upon this morning.

Q. Is there a reservoir site in the Adirondacks that is at an elevation of approximately 600 feet above the sea level?

A. There are some sites there higher than that.

Q. But a great deal of the force of the gravity would be consumed by friction, would it not? 535

A. In the aqueduct.

Q. Do you know how much of that will be lost when the present reservoir has been completed in the fall of six hundred feet, to New York City? Approximately about one hundred and fifty to two hundred feet?

A. That or more.

Q. So that the water will only raise by the force of gravity as high as four hundred feet in the office buildings and apartment houses of the City of New York?

A. I should say three hundred feet.

Q. Or in that neighborhood? 536

A. Yes.

538

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT—NEW YORK COUNTY. . .

In the Matter

of

The Application and Petition of
 JOHN A. BENSEL, CHARLES N.
 CHADWICK and CHARLES A.
 SHAW, constituting the Board
 of Water Supply of the City of
 New York, to acquire real
 estate for and on behalf of the
 City of New York, under Chap-
 ter 724 of the Laws of 1905,
 and the Acts amendatory there-
 of, in the Town of Hurley,
 County of Ulster, New York,
 for the purpose of providing
 an additional supply of pure
 and wholesome water for the
 use of the City of New York.

539

Ashokan
 Reservoir,
 Section No. 15,
 Parcel No. 733.

WILLIAM SAGE, JR.,
 Claimant,

540

vs.

THE CITY OF NEW YORK,
 Petitioner.

New York City, N. Y., March 20, 1911.

The Commission convened at 11 a. m. pursuant
 to adjournment at Room 700, No. 47 Cedar Street,
 New York City.

Present—Hon. GEORGE E. WELLER, Chairman,
 Hon. FRED H. PARKER,
 Hon. GEORGE W. BATTEN,
 Commissioners of Appraisal.

541

APPEARANCES:

ARTHUR S. BARNES, for the Corporation
 Counsel of the City of New York.

EDWARD A. ALEXANDER, Esq., for Claim-
 ant William Sage, Jr., *in re* Parcel No.
 733.

CORNELIUS C. VERMEULE, called as a witness for
 the claimant, and being first duly sworn by the
 Chairman of the Commission, testified as follows:

542

Direct-examination—By Mr. Alexander:

Q. Mr. Vermeule, where do you reside?

A. East Orange, N. J.

Q. Have you had any experience as an engineer in
 connection with water companies?

A. I have, covering about 20 or 25 years.

Q. Have you held official positions in the State
 of New Jersey?

A. I have.

Q. Have you been retained as consulting engineer
 in a large number of matters?

A. I have.

Q. Will you describe to the Commission, in de-
 tail, some of the experience you have had as an
 engineer?

543

A. I have acted in the capacity of consulting en-
 gineer to the State of New Jersey since about 1885,
 in all matters concerning water supply and drain-
 age, and since 1888 I have been in general prac-
 tice in New York City at No. 203 Broadway, and
 have acted as constructing engineer, or consulting
 engineer, to a good many cities and water companies
 —consulting engineer to Jersey City, and construct-

- 544 ing engineer for East Orange, and engineer for the South Jersey Water Company, some years ago, in reporting plans and estimates and specifications for the supply of Camden and Philadelphia, engineer of the Portsmouth and Suffolk Water Company of Virginia, for which I prepared plans for the supply of Portsmouth and Suffolk and Norfolk, and consulting engineer to the Hackensack Water Company, Queens County Water Company, Summerville Water Company, Plainfield Water Company, and a very large number of water companies in this vicinity and Middle States, also engineer on the Water Works and Sewer Works of Cienfuegos, Cuba, and for some private corporations operating in Cuba.

545 Q. In any of the cases, or any others, did you have charge of acquiring the land for reservoir purposes?

A. Yes, I have had general charge, and advised as to the value of lands and expediency of purchase.

Q. Can you mention any of those instances?

A. In the matter of the East Orange Works, Hackensack Water Company, Portsmouth and Suffolk Water Company, Hudson, New York, and perhaps at least a dozen other cases.

Q. And have you acted for parties who contemplated buying reservoir sites and who did buy?

A. I have.

546 Q. Have you advised as to the value of such sites?

A. I have.

Q. Have you made estimates from time to time as to the value of reservoir sites?

A. Yes.

Q. And have you appeared as an expert witness in assigning the value of reservoir sites?

A. I have, and also as arbitrator in fixing the value of reservoir sites.

Q. Parts of reservoir sites?

A. Yes.

547

Q. Can you mention to the Commission some of the instances where you have testified as a witness concerning the value of reservoir sites, or parts thereof?

A. Cases at Troy, N. Y., and Syracuse, N. Y., and Hudson, N. Y., I think that those are the only ones in litigation.

Q. Have you acted as a witness in the courts of New Jersey in any of these cases?

A. Not specifically on reservoir sites; I have on the value of water works, water power and similar questions.

Q. In the value of water works it was necessary also to value the sites of the reservoir?

548

A. Yes.

Q. And you appeared as a witness?

A. Yes.

Q. And gave testimony in those cases?

A. I did.

Q. Are you generally familiar with all the estimates of value that enter into the fair and reasonable value of reservoir sites, and parts of reservoir sites?

A. Yes, I believe so.

Q. Have you examined the maps, documents and official reports relating to the Catskill Water Supply and the Ashokan Reservoir?

549

A. I have.

Q. Over how long a period of time did your examination cover?

A. The examination has been made from time to time during the past three or four years—examination of the reports and documents and estimates; and I could not say readily exactly how much time it has covered, but a good many days and weeks. My examination on the ground has not covered so much time. I made two visits within

550 the last three or four years, and two or three visits earlier.

Q. Have you ever been employed by the City of Brooklyn?

A. Yes, I was employed by the City of Brooklyn, between 1890 and 1894, sometime.

Q. For what purpose?

A. For examining the general availability of the Ramapo Water Shed and the storage sites on the Ramapo Water Shed, and recommending sites for development on that stream.

Q. Have you made a special study of the City of New York, and other cities in the Hudson Valley for additional water?

551

A. I have. I am quite familiar with the needs of all the cities for 20 or 25 miles around New York and up the Hudson Valley as far as Cohoes and Schenectady.

Q. You are thoroughly familiar in all those matters?

A. I think so—twenty-five years.

Q. What can you say as to the special adaptability and availability of the Ashokan Reservoir site?

A. The Ashokan site is peculiarly adaptable for reservoir purposes, and especially valuable for possessing the elements of value, such as sufficient elevation, excellent quality of water, reasonable accessibility and geographical position.

552

Q. Has it steep marginal slopes?

A. Yes, it has steep marginal slopes. They are sufficiently steep to give good results in the quality of the water.

Q. How do the marginal slopes affect the water?

A. They improve the quality of the water, in decreasing the amount and number of vegetable organisms in the water, and generally lower temperature, which is less apt to develop vegetable organisms—in fact, all kinds of organisms.

Q. That is, the deeper the water in a reservoir, the less chance of breeding of deleterious animal organisms? 553

A. Yes, that is generally true.

Q. Because the sun cannot heat the water so quickly as if it is shallow?

A. In the deeper reservoir the water is cooler.

Q. What can you say as to the large yielding capacity of the watersheds of the Esopus and Schoharie?

A. The Esopus particularly has a good yield. It is so situated as to receive a rather large rainfall, relatively, and it has a large yielding capacity.

Q. What is meant by the yielding capacity of a watershed? 554

A. It is the amount of water, per square mile, which can be made available for city water supply.

Q. Is there any characteristic inherent in any particular watershed which makes its yielding capacity greater or less than another watershed?

A. Yes. From several causes the yield is larger from some watersheds than others. Some have a larger rainfall, which, of itself, causes a larger yield and the nature of the soil and sub-soil and character of the slopes, the amount of swamp areas, all determine the amount to be made available for water supply. And, of course, an indispensable element is a reasonable reservoir capacity for storage. 555

Q. And that capacity depends upon the dimensions of a particular reservoir site?

A. It depends upon the dimensions of the available water storage sites. There may be one or more.

Q. What can you say with respect to the Ashokan Reservoir site, so far as its capacity is concerned to impound the water of the Esopus watershed?

A. It has ample capacity to store and conserve a large yield from that watershed.

556 Q. And can also store and conserve the yield of tributary watersheds—part of the yield?

A. Yes, not much more than half is needed for Esopus alone. The remainder of capacity can be made available for the storage of water from Schoharie and Catskill Creek. It is really the only large site in the Catskills at proper elevation for the development of these different watersheds and storage of the waters.

Q. So without this reservoir site, could the waters in these watersheds be developed and used?

557 A. No. This reservoir site is practically indispensable to the development of as large an amount of that supply as should be developed to make it economical.

Q. What do you mean by the catchment of the watershed?

A. It is the tributary watershed, the area which receives the rainfall which flows to the reservoir or point of collection.

Q. What can you say about the catchment of the watersheds tributary to this reservoir site?

Chairman: By this reservoir site, you mean Ashokan?

558 A. The Esopus watershed, which is the immediate and natural tributary, is a desirable watershed in all of the essentials of slopes, comparative absence of swamps, fair percentage of wood land, and small percentage of cultivated lands. It has the desirable elements for a catchment for city water supply. The other watersheds in the Catskills have the same elements in large measure, except that they are deficient in the matter of storage capacity.

Q. That is, there is in the other watersheds no reservoir site of sufficient capacity to impound the necessary amount of water that the City of New York needs and other municipalities need?

A. That is it. There is no reservoir site within the natural catchment.

559

Q. Is this Catskill water the best water at a sufficient elevation for delivery to points of consumption within equal distance from points of consumption?

A. It is.

Q. What can you say as to the demand for water within one hundred miles of the Ashokan Reservoir?

A. The demand is large, amounting to about 728 million gallons a day at the time of my last canvass of it in 1907, and it is increasing about 50 per cent. each ten years, which will call for 1,107,000,000 gallons a day by 1917, and 1,660,000,000 gallons a day by 1927.

560

Q. This demand for water for drinking and manufacturing purposes and for the use of inhabitants of various cities has also been very great for ten years prior to 1907?

A. Yes, it has been increasing at least 50 per cent. each ten years. It increases somewhat more rapidly than the population.

Q. And in your opinion will this demand absorb all the good available reservoir sites near New York City within the next twenty years?

A. Yes, it will.

Q. Where does this demand come from?

561

A. From New York, all the cities up the Hudson as far as Cohoes and Schenectady, and New Jersey within twenty miles of New York.

Q. Mention some of those cities?

A. Jersey City, Newark, Paterson and a group of cities known as the Oranges, of about one hundred thousand population, Passaic, Elizabeth and other cities having an aggregate population of about 1,500,000.

Q. Are those cities continually growing in population?

562

A. Rapidly; about forty per cent. population each ten years.

Q. Are they badly in need of water?

A. They are continually extending and continually needing more water.

Q. Are the cities along the Hudson Valley growing in population, particularly those nearer New York City?

A. Yes, those near New York are growing. Those further up are growing less rapidly, but still increasing their demands for water.

Q. How about the cities in Connecticut and contiguous territory?

563

A. They are in much the same condition—rapidly increasing their demand for water, although I have not included those cities in these figures.

Q. But you have heard of their necessity for water?

A. Yes, I know they are continually increasing their supply and adding to their works.

Q. Have you made a particular examination of Parcel No. 733, Section 15, known as the William Sage, Jr., property?

A. I have.

Q. Did you make this examination for the purpose of coming here to testify as a witness as to the fair and reasonable market value of that property?

564

A. I did.

Q. Did you estimate the fair and reasonable market value of that property, taking into consideration all its elements of value?

A. I did.

Q. In your opinion, what was the fair and reasonable market value of Parcel No. 733 at the time when the City of New York took title to it—May 22, 1909?

A. \$57,836.

Q. Now, will you explain to the Commission, in detail, Mr. Vermeule, how you arrive at that value?

A. A value is arrived at by a valuation of the Asho- 565
kan Reservoir basin as a whole for reservoir pur-
poses, and a comparison between the cost of obtain-
ing water of equally good quality with the Esopus
water and with equally good pressure.

Q. By that you mean the saving to the City of
New York by taking this reservoir site in prefer-
ence to the next cheapest and available one?

A. Yes, its saving by taking this site as compared
with four other available sources; I have taken the
average of the four.

Q. Now, will you go very slowly and explain
each step of this, so that the Commission can un-
derstand it thoroughly? 566

A. This water from the Ashokan Reservoir is
delivered at New York City at 300 feet elevation
above sea level. I have taken first a comparison
with the Croton, which is already in use; that water
is delivered to the City at 120 feet elevation. The
difference in hardness between the Catskill water
and Croton water makes the Catskill water worth
\$1.60 per million gallons more than the Croton
water. Its additional elevation of 180 feet makes
it worth \$10.80 per million gallons more than the
Croton. Its relative purity, freedom from organ-
isms, makes it worth \$9.00 per million gallons more
than the Croton, giving a total of \$21.40. For 5 567
million gallons daily, this gives a yearly value of
\$3,905,500. Capitalizing this at five per cent gives
\$78,110,000. Against this, I have charged the cost
of the aqueduct bringing the water from the Asho-
kan Reservoir as far as Croton Lake, which I esti-
mate at \$36,818,000, leaving a net value over the
Croton of \$41,292,000. I have taken the Ashokan to
represent about two-thirds of the total storage and
total value and that gives, for the value of the Asho-
kan—this Ashokan Reservoir site—intrinsic, \$27,-
\$61,333. The next comparison is with a supply

568 taken from the Hudson River, pumped at Hyde Park. It is necessary to raise that. It is river water. It is necessary to raise that 450 feet in order to deliver it with the same head as the Catskill supply. The cost of doing this comes to \$24.75 per million gallons.

Q. Where did you obtain that cost, Mr. Vermeule?

569 A. That is from my experience in pumping water and from the general experience of New York City and other cities in this vicinity. I will say that the actual cost to the City of New York is considerably greater than I have taken, but I believe it can be done for this amount. This comes to \$4,269,375, annually, which capitalized at 5% gives \$85,387,500. On the basis of its alkalinity or hardness, the Catskill supply is worth \$5,000,000 more than the Hudson River supply; that is, it would cost that amount to reduce the Hudson River water to the same hardness as the Esopus water.

Chairman: Mr. Vermeule, you say the Catskill supply? Does that mean the Esopus and Catskill Creek also, or are you speaking of only—

The Witness: Yes, it means the Catskill supply.

570 Chairman: In its entirety?

The Witness: Yes.

Q. It means the supply the City is now engaged in developing?

A. Yes, the average hardness is taken of the Esopus and Rondout and the Schoharie.

Q. It does not include Catskill Creek, does it?

A. No. On the basis of purity the Catskill water is worth \$9 per million gallons more than the Hudson River supply, making our total value \$32,850,000. Carrying forward these amounts, we have a

total of \$123,237,500 as the value of the Catskill supply over the Hudson River supply. Against this, I deducted the difference in the construction and cost of the works necessary to bring Catskill water down as far as Hyde Park. This construction cost for the Catskills amounts to \$67,624,400. The construction cost of the Hyde Park pumping plant comes to \$4,924,000, leaving excess cost for the Catskill supply of \$62,700,400. Deducting this from the previous value, I have a net value of the Catskill over the Hudson of \$60,537,100, of which I ascribe two-thirds as the value of the Ashokan Reservoir site, which comes to \$40,358,067. I have made a third valuation of the Ashokan Reservoir site on the basis of the greater cost of getting an equal amount of water from the Rondout and Schoharie Creeks, or getting it from the Esopus and Ashokan Reservoir, taking a supply of 250 million gallons daily from Esopus Creek, which is obtainable there from that creek alone, and comparing it with a supply of 250 million gallons daily from Rondout and Schoharie Creeks, we find that the 250 million gallons daily from the Rondout and Schoharie development, allowing that development to use thirty-five billion gallons storage in Ashokan Reservoir, and charging it with the cost of thirty-five billion gallons in that reservoir comes to \$37,245,100. The cost of 250 million gallons a day from Esopus Creek and Ashokan Reservoir alone, which can be obtained by using seventy million gallons daily of the capacity of the Ashokan Reservoir, is \$17,019,919. The additional cost by the Rondout and Schoharie—or to put it another way—the saving by use of the Ashokan Reservoir is, therefore, \$20,225,181. And since this is using only seven-twelfths of the capacity of the reservoir, the equivalent value for the whole reservoir site would be \$34,671,732.

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- 574 The fourth valuation is made by taking the saving in getting 250 million gallons from the Ashokan Reservoir, as compared with 250 million gallons daily taken from streams east of the Hudson River in Dutchess and Columbia Counties. The cost of construction for the Dutchess and Columbia reservoirs will be \$24,961,659. The difference in value of the two supplies due to alkalinity or hardness, which is considerably greater in the Dutchess and Columbia water, amounts to \$12,000,000. The total cost of 250 million gallons, daily, from Dutchess and Columbia, therefore, for water of equal excellence, is \$36,961,659, whereas the cost from Ashokan Reservoir, including the aqueduct from Ashokan to Billings Reservoir, or to the same point of delivery in Dutchess County, comes to \$25,020,824. The difference in favor of the Ashokan Reservoir is \$16,940,835. As this is for the use of practically half of the reservoir capacity, it gives an equivalent value for the whole of the Ashokan Reservoir site of \$33,881,670.
- 575

- I have taken these four valuations and averaged them, and the average of all for the Ashokan Reservoir basin comes to \$34,193,200, which I take as the intrinsic value of that reservoir site. That, if it is spread over the entire ten thousand acres of reservoir site, would amount to an intrinsic value of \$3,400 per acre. I have taken for the market value, spread over the entire site, forty per cent. of this, or \$1,360 per acre, for an average depth of reservoir of 36.2 feet.
- 576

The upper half of the capacity of the reservoir would diminish this value somewhat, according to the depth of flowage, not in direct proportion to the depth, but about half the rate, on the idea that the lower half of the reservoir would be surer to be used within a given time than the upper half, that a purchaser of the reservoir site would get a quicker use and quicker return from the lower

half than from the upper half, and that the use of the upper half—the land that flowed less deeply—would be more readily avoided than the upper part. Parcel No. 7333 has 40.47 acres within the flow line of the reservoir, and this is flowed to an average depth of 22.1 feet or 61 per cent. of the average for the whole reservoir—or say 60 per cent.—which would amount to \$816 per acre, that being 60 per cent of \$1,360, the value previously given. But I take the mean between this and the value on the area basis; that is, instead of discounting 40 per cent. for the less depth, I discounted half, or 20 per cent., the valuation on the area basis being \$1,360 per acre; this gives a mean for the two of \$1,081 per acre. 577

46.02 acres of this parcel is marginal land; and this I value intrinsically at \$750 per acre, and the market value at 40 per cent. of that, or \$300 per acre. 578

Consequently, I have for the flowed lands 40.47 acres at \$1,088, and for the marginal lands 46.02 acres at \$300, making a total for the whole tract of \$57,836.

Q. Now, is that value, \$57,836, the value of this property to the City of New York?

A. No, I have not regarded it as the value to the City of New York in any sense, in which I have ascribed a special value to it, because it is necessary to the City of New York; but, it is the fair value, taking into account all of the surrounding circumstances and the population which is growing up, increasing and demanding a supply, of which, of course, the City of New York is a substantial part. 579

Q. That is the City of New York would be one of the customers for this water?

A. Yes.

580 Q. And this value of \$57,836, which you have placed upon the property as the value, is not what you would naturally expect that the property would bring in the open market between a willing buyer and a willing seller, in case the buyer was not a municipality outside the City of New York?

A. Yes, in case of a willing buyer and willing seller, assuming that both have full knowledge of all the elements of value.

581 Q. These figures that you have given, anywhere from 33 million to 4- million dollars, that is the intrinsic value of this reservoir site, which you have averaged at 34 million dollars, does this represent the entire savings to the City by taking this site to the next cheapest available site?

A. Yes, practically. Those valuations are placed practically on a saving to the City. There are some cases, perhaps, where every item of saving has not been charged, but practically they have.

Q. Those figures are the savings to the City of New York?

A. Yes.

Q. And you think that the Ashokan Reservoir site, by the use of which this 34 million dollars is saved the City of New York, has an inherent element of value and is entitled to be valued, to at least a proportion of these savings?

582 A. Yes, a reasonable part of the intrinsic value.

Q. And assuming the fair and reasonable value of this property as between a willing buyer and a willing seller, and that percentage of savings, and an element of value which any man who understood his business in valuing this property would and should take into consideration?

A. Inevitably, certainly.

Q. And if he didn't take it into consideration he could not place a correct value as to the fair and reasonable market value of this property?

A. No, he could not.

583

Q. From your experience, is it ridiculous and absurd to value this property as farm property as the City of New York has been doing in this proceeding?

A. It is not. If I want to get a bargain I would buy them on that basis.

Q. Do you know whether this water supply the City is now developing by impounding water of the Esopus and Schoharie and Ashokan Reservoir site, will be a profitable financial investment to the City after it has been completed?

A. Unquestionably, it will be with good business management; it should be.

584

Q. The City is building it and proposes to operate it as a business venture, does it not?

A. Yes.

Q. The same as a private water company would do?

A. Yes.

Q. And to make considerable profit out of the transaction?

A. Yes.

Q. Have you heard about how much profit the City expects to make per annum?

A. Yes, I have heard it estimated. Of course, it is to be expected that they will make a profit; that is the ordinary result of such operation. Many cities are making large profit.

585

Q. Can you mention any city that is making large profits?

A. East Orange, Newark, New Brunswick is paying into its treasury each year a large amount of money from the water works. It is within the power of practically every city to make a profit, unless they choose to give the people the benefit by reducing rates, which is the same thing; the people get it instead of the City.

586 Q. Do you know whether the Croton system is profitable or not?

A. It is decidedly profitable.

Q. The Croton system has paid for itself long since?

A. It has.

Q. Everything the City is getting from the sale of Croton water is velvet?

A. I have not looked up that part of it. There are some reasonable expenses. As a whole, the Croton has paid for itself, and it still is a going concern of much value.

Cross-examination—By Mr. Barnes:

587 Q. What sort of an expert witness are you? What classification? Public accountant or real estate man, or what?

A. Civil engineer.

Q. How long have you been a civil engineer?

A. About thirty years, thirty-two years.

Q. As part of your profession as civil engineer, you have bought and sold reservoir sites?

A. I have advised as to the purchase and selling of reservoir sites.

Q. Municipalities?

A. Municipalities and companies.

588 Q. Have you advised municipalities as to the value of reservoir sites, prior to your connection with these proceedings?

A. I do not know that I have, prior. Yes, I do not know but I have, some four or five years prior.

Q. Where?

A. In Rensselaer County.

Q. Some of the municipalities where you have been engaged in investigating water supply, are Troy, Syracuse and Hudson?

A. Yes, I mentioned Troy, Syracuse and Hudson.

Q. Were you investigating those on behalf of the municipalities or the owners of the lands? 589

A. Syracuse was the owner of the property, and Troy was the owners of the property, and Hudson was the City.

Q. Now, when you investigated the amount that was to be taken by the municipality of Troy, did you make calculations and computations on the same theory that you made them in this case?

A. Generally, similar. The cost of getting the water from that particular site as compared with others.

Q. And when you did the same work for the City of Hudson, did you follow the same theory? 590

A. No, I think not. I do not think there was any question of alternative sites involved there.

Q. Can you recall a case of a municipality where there was a question of alternative sites involved, where you investigated for the municipality?

A. Yes, that was practically the case at East Orange.

Q. Take East Orange. Did you follow the same theory of computation that you have in this case?

A. Generally speaking, about the same.

Q. You figured how much profit they could make, how much saving they could make, out of one particular site? 591

A. Yes, the whole scheme was based on the saving.

Q. So that, taking another site, their construction expense would have been greater?

A. Yes, and the water not so good. It was all taken into account.

Q. But your prime object was the question of expense, is that it?

A. That was a factor. It hardly could have been called the prime object, because we have a cheap supply which we would not have under any con-

592 sideration. The prime factor is the quality of the water.

Q. This is secondary then?

A. It is secondary in a sense. You must have water of proper quality.

Q. This value that you have given here is the value of this land after it is come into use?

A. It is the value of the land, considering the probability of its coming into use, the demand for it.

Q. You mean to distinguish now its value when it is not available, and its value after it is available?

593 A. I do not think the City would sell it after it is in use. It would be worth more than the intrinsic value after it is in use.

Q. In your opinion, would it have increased in value? Would the fair market value have increased?

A. I think it is almost impossible to say what the fair market value of a city reservoir would be, unless it has been put in use, because it is out of question to consider the alienation of that property.

Q. So that this amount that you have testified to, is, in your opinion, the fair market value of this land?

594

A. Yes.

Q. Was that a result arrived at from this mathematical process which you have detailed in great length?

A. Mathematics were necessary to get the figures. The process was mental.

A. Yes, the figures were the result of a mathematical process?

A. Yes, the figures were the result of a mathematical process, certainly.

Q. Did you make an examination of this property?

A. Yes.

595

Q. And you think that the land which is flowed by the reservoir at a greater depth is more valuable than the land which is flowed at a less depth?

A. To the extent I have mentioned, yes; not after it is flowed, but in anticipation of its being flowed.

Q. And this land is practically the high land of the reservoir site?

A. It is pretty well up.

Q. Only a portion of it is flowed?

A. Only about half of it.

Q. The land, adjoining land, that is not flowed, further up the incline, in your opinion, does the same ratio of value attach to that as the land flowed in this parcel?

596

A. The same value attaches to a reasonable margin which I have adopted, and which I understand the City has adopted, a total of 5 thousand acres of marginal lands, which is a little over one thousand feet around the reservoir.

Q. How many times did you examine this reservoir site, did you say?

A. I have examined it specially on two occasions, but was familiar with it through three prior visits, at least. That is all that I can recall.

Q. Did you make any notes on these visits?

A. Yes, I made a good many notes.

Q. Have you the notes with you?

597

A. No.

Q. When did you see them last?

A. I do not know; I think I saw them—I possibly saw them within a week.

Q. But you didn't bring them to-day?

A. No.

Q. Did you make up your computations from those notes?

A. Yes, originally, to some extent, although the notes were not very essential to my computations.

598 Q. You had other data upon which you based your computations?

A. Yes.

Q. So that, as a matter of fact, you could have valued this reservoir site without going up there?

A. No, I never do that.

Q. But if your value is the direct result of a computation, rather than data you had on your visit, why cannot you make your computation without going up there?

A. Because my method is apt to be changed by the use of data.

Q. Is that a fact in this instance?

599 A. I do not believe it was, but it was necessary to know whether it would be or not.

Q. Just to find it out?

A. Yes.

Q. So you thought it wasn't necessary to look it over?

A. I thought it necessary.

Q. That is after you looked it over?

A. It was very much as I remembered it and expected it to be.

Q. You have testified to certain figures which you have sworn was your opinion of the fair market value of this property, is that correct?

600 A. I have.

Q. What do you mean by fair market value?

A. I mean the value between a willing seller and willing buyer, both fully informed as to all elements of value of the property.

Q. What, in your opinion, evidences fair market value?

A. I can only say what evidences it to me. If I am going to buy property I make an examination of it, determine its possibilities, and determine what is reasonably the value I can expect to get for it if I want to sell it again, and how long I

would have to hold it to realize on it, what I would get out of it by holding it; that is its value to me. 601

Q. That is your idea of fair market value?

A. That is the way that the purchaser—the point of view from which he would purchase it. The seller would do the same, I imagine.

Q. You think they proceed from the same point of view, the buyer and seller?

A. They do not always, in practice. Sometimes, only one of them knows.

Q. You are speaking of real estate in that answer?

A. Yes, that is included in any kind of property.

Q. In your opinion, does the actual sale price of a piece of land affect its market value to any degree? 602

A. In a good deal of property it has no affect. If property is of a nature where it is frequently bought and sold, it may have some value; and even then, you have got to know the seller was posted as to current values. I do not think that necessarily the actual buying and selling price is any indication.

Q. Did you ever buy a piece of land yourself?

A. A lot of them.

Q. And in those cases you didn't give as much as it was worth? 603

A. I bought some at a hundred dollars an acre and sold it at six thousand dollars an acre.

Q. And did you ever pay more for a piece of land than you actually sold it for?

A. Yes.

Q. So that, as a matter of fact, the sale price is not any indication at all?

A. No.

Q. You have gone into a statement that the buyer and seller must know of all the circumstances surrounding the value? A. The seller and purchaser

604 must both know the elements of value in the property, in order to have their minds meet on the fair market value of the property.

Q. And in case they do, the purchase price would indicate to a fair degree of accuracy, the fair market value of the property?

A. Yes, if they are fully informed, and then I qualify that, because it is sometimes how badly a man needs the money.

Q. But prima facie, if a man knows all the circumstances, for instance, as to the possibility of a mineral deposit in the ground, the value of the property would be the price that the buyer would
605 give to the seller?

A. I should want to know all about the buyer and seller in each case.

Q. Prima facie, it would be an indication of the value, and after you had investigated and found satisfactory conditions surrounding the sale, that would affect your judgment?

A. No, I would not even consider it prima facie evidence, unless it was property which had been frequently bought and sold, and had an established value in the market.

Q. As a matter of fact you testified that as far as the value of the real property itself is concerned, the amount that might be paid for a particular tract of land is no indication of value to you?
606

A. In many cases it is not. In some cases it would be. It would depend entirely on circumstances.

Q. Well, let us come down to the Ashokan Reservoir site. You do not think that the purchase price of property in that locality is any indication of value, do you?

A. The purchase price—do you mean by that the purchase price, regardless of its use for a reservoir, or any knowledge of its use, the buying and selling

price before this project was contemplated—as farm land?

607

Q. You have made a careful study of this proposed water supply project, I assume?

A. Yes, I have.

Q. I am particularly referring to the Ashokan Reservoir?

A. Yes, I have studied the whole project from all points of supply.

Q. That reservoir is practically in two separate parts, as you understand it, isn't it?

A. Yes.

Q. A portion of it is fed by the Esopus, and a portion of it will be fed by the waters from the Catskill and Schoharie, is that correct?

608

A. Not strictly, because either part of it can be fed from any of the waters.

Q. Only a portion of it is needed to store the water from the Esopus?

A. Only about half of it—a little over.

Q. This particular piece of land is not within that portion which would be utilized for the storage of the water from the Esopus?

A. You cannot make any such distinction, in my judgment. The water from the Esopus can be, at any time, drawn into this part of the reservoir.

Q. Isn't the other portion of the reservoir sufficient to store the water from the Esopus?

609

A. It is sufficient, but you are asking me if it can be so used.

Q. No, I am asking you if it is necessary, in order to store water from the Esopus?

A. No, the part of the reservoir running from the cross embankment would be sufficient for the Esopus alone.

Q. And this particular parcel is without that area?

A. Yes.

610 Q. Do you know whether any construction work has been begun, looking to utilize the waters from the Schoharie or Catskill?

A. Not yet, I believe.

Q. Don't you know?

A. I am not positive. I do not think any substantial work has been done on the Schoharie.

Q. Do you know whether any amount has been done up there?

A. I am not positive.

Q. You did not investigate that?

A. No.

611 Q. How long have you been familiar with the exploitation of land for water supply purposes?

A. About twenty-five years.

Q. Are you familiar with the Ramapo Company's having made investigations of certain lands for that purpose?

A. There was something in the Ramapo Company, yes.

Q. Do you know where they investigated? A. Yes, I stated that I was employed by the City of Brooklyn to look up their first proposition.

Q. That was on the Ramapo River?

A. Yes.

Q. You didn't think much of it?

A. I did not say that.

612 Q. Did you?

A. Much of what? The Ramapo River is a great supply. It was recommended. The proposition I am not referring to, but the supply itself was good, and was recommended to the City of Brooklyn as a good supply.

Q. Did you investigate it for the purpose of determining whether it was or not?

A. Yes.

Q. And did you investigate it for the purpose of determining the land that must be taken for that purpose? A. To some extent.

Q. Did you go all through this mental process, through which you arrived at your view here? 613

A. Not specifically as to reservoirs; in a general way, yes; by the same general process of reasoning, selected the sites that were best for the development of that supply.

Q. Construction cost?

A. Construction cost, depth, slope, marginal cost.

Q. Did you make any recommendation to the City of Brooklyn?

A. Money?

Q. Yes.

A. We told them what they could build it for, yes. 614

Q. I am referring to the purchase of the land necessary before you could develop?

A. Only in a general way; the sites were plotted, to show them how much land would be necessary, but the valuation of the land itself was made only in a general way.

Q. In the same way as in this case?

A. In the selection of the sites; but in the general analysis we recommended certain sites as best.

Q. You did not make any definite recommendations as to the purchase of lands in Ramapo?

A. No.

Q. Have you ever done that?

A. Frequently. 615

Q. In New Jersey?

A. Yes, and elsewhere.

Q. In your opinion, the value of land in the State of New Jersey is a criterion of value for land in the State of New York for reservoir purposes?

A. Well, the same elements enter into both questions in both States.

Q. That is a question of mathematical calculation in both instances?

616

A. Yes, in weighing up the matter of sites.

Q. So if this Ashokan site was transferred to the State of New Jersey, you would get the same amount as value as in this instance, that is, if the distance and character of water, etc., were the same?

A. You are calling heavily on my imagination. I do not see how I can transplant that into Jersey.

Q. Do you know whether, as a matter of fact, this region has been investigated for the purpose of availability for water supply purposes for the past ten years or so?

A. Yes, nearly that.

617

Q. Do you know any sales of land made to the Ramapo Company?

A. No, I was not familiar with the sales of land.

Q. You made no investigation of that?

A. No.

Q. You recall when the Ramapo Company first went up into this region?

A. Yes.

Q. In speaking of the different elements that are to be considered in choosing a reservoir site, you spoke of the different qualities of the water and the relative hardness, etc., and in making your figures you included a computation of the cost of reducing the quality of water in one watershed to the quality of the water in the other?

618

A. Yes, reducing the hardness, not exactly the hardness, for the whole supply, but the cost of reducing the part of the supply that was necessary to be soft for water purposes, laundry uses, and so on.

Q. After that was done, there would be no difference in the quality of the two supplies?

A. They would be the same except hardness.

Q. Do you know who owns this parcel 733?

A. I have been informed, I do not know positively.

Q. Do you know when he bought it?

A. No.

Q. You did not make any inquiries as to what he paid for it?

A. No.

Q. You did not consider that necessary?

A. No.

Q. You relied upon your mathematical process?

A. I relied upon the process which I have explained fully.

Q. You stated, I believe, on your direct examination, that the value of the land for this purpose was dependent upon its possibility for present use?

A. I do not quite catch that.

Q. You testified that the value of the land was dependent upon the possibility of present use?

A. No, I did not say that.

Q. So that if the record shows that you did say that, it is in error?

A. The record is in error.

Q. In your estimating the value of the marginal land, did you take in the entire residue of the property that is not to be flowed?

A. No, I allowed about 5 thousand acres, which corresponds to a belt, something over a thousand feet wide, around the margin.

Q. Does that thousand feet take in all of the property included in Parcel 733?

A. Yes. The land I took in would include all of that. It varies sometimes. It is a little more than a thousand feet in places and less in other places.

Q. You testified in your direct examination that the intrinsic value of that land was \$750 an acre, is that correct?

A. Yes.

Q. What do you mean by the intrinsic value of the land being \$750 an acre?

619

620

621

622 A. That is, in my opinion, what it is worth to a city to have that marginal strip for protection.

Q. You think a thousand foot strip is absolutely necessary?

A. It is desirable, not absolutely necessary. If you do not get it you must do something else.

Q. You think one thousand feet is sufficient?

A. Yes.

Q. You do not think the land outside of that thousand foot strip has the same value?

A. It would not have the same value for reservoir purposes, in my judgment.

Q. How did you arrive at that sum of \$750?

623 A. That is, in my judgment, about what it would cost the City if it did not own the strip, in order to safeguard the City against pollution.

Q. And you think they could do it for that price?

A. Yes.

Q. What is the advantage of having the strip?

A. It is an easier way. It does not cost you any more money. In fact, if you buy it at my market value of \$300, it is far cheaper than any other way.

Q. But the intrinsic value is \$750 an acre?

A. Yes.

Q. And this \$300 an acre is an arbitrary figure fixed by yourself?

624 A. It is my judgment of a fair relation between the intrinsic value and the fair market value.

Q. What do you mean by that?

A. I have taken the fair and reasonable market value as 40% of the intrinsic value.

Q. You do not think the intrinsic value is the fair market value?

A. No, I do not think it is reasonable to ask the City to pay all that it is worth to the City, or ask any city, or any company, all that it is worth.

Q. Do you think that is just to the property owners?

A. You have got to take into consideration that the City has got to make some additional investment to bring this value out. 625

Q. It is not there until the work is done?

A. Yes.

Q. The market value is less than the intrinsic value?

A. Yes.

Q. After the City has done this work you think the land is worth \$750 an acre?

A. Yes, after someone has done it.

Q. That is because of the fact that it will cost them that amount to produce the same results by some other means? 626

A. Practically, yes; they save that much by buying.

Q. So that, if they adopted the other means, they would spend the same amount?

A. On the intrinsic value, yes, not on the market value.

Q. That sum of \$300 is not the result of any knowledge of sales of real estate in that section that you know of, is it?

A. No.

Q. It is purely the result of a mathematical process?

A. It is the result of reasoning and judgment, with mathematics used as an instrument or tool. 627

Q. You first reason and then judge?

A. Mathematics are only a tool in the hands of a man who thinks.

Q. How did you get the 40%? Did you get that in the same way?

A. No, that is not mathematics, that is judgment.

Q. You have assumed that this water would be delivered to the City Line at 300 ft. elevation?

A. Yes, I say that it can be.

Q. Is that an assumption?

628

A. It is not an assumption; it can be.

Q. You assume that as a fact? Did you take that as a fact?

A. Yes.

Q. The Croton is considerably lower?

A. Yes, about 120 ft.

Q. The Croton supply is supplying most of the City as you understand it?

A. Yes.

Q. That is a low pressure system?

A. Yes.

Q. Can the water from the Ashokan Reservoir be distributed by the same distribution system?

629

A. A part of it; a part of the Croton supply is pumped for high service in the upper part of the town, Murray Hill, and above.

Q. That is the portion of the distributing system that you say can utilize the water from the Ashokan Reservoir?

A. Yes, all that high service district can use the water from the Catskills.

Q. What proportion of the population lives within that area, do you know?

A. I do not know offhand, but it is pretty large. The population down town is not increasing; up town does increase; that would include the Bronx also; the Bronx could use additional pressure advantageously.

630

Q. In the cost of construction, have you considered the expense of installing a high pressure distributing system?

A. No, it is not a part of it.

Q. You simply deliver to the City Line?

A. Yes. If you pump water to an equivalent elevation you would still have to provide a distributive system. I simply took the cost of pumping.

Q. So that they do not save anything by not having a pump?

A. They save a lot by not having a pump.

631

Q. What did you say was the intrinsic value of the land that was to be flowed on that parcel?

A. I did not figure it out. I simply gave it as so much an acre on the area basis. I said it was \$3400 an acre. That would have to be reduced about 20% to give the allowance for depth.

Q. The elevation of the land embracing this parcel is not the same all over, is it?

A. No.

Q. That is why part of it is under water and part of it is not?

A. Yes.

Q. You testified on your direct that the land that was lower was more valuable than the land that was higher, I believe?

632

A. I stated that generally in the upper half of the reservoir, the upper portion of the reservoir, some additional value should be allowed for land lying lower, on the ground that it was more liable to be used, more difficult to avoid using.

Q. As I understand your methods, you have not assumed any selling price for this water?

A. No.

Q. That is, it has been a comparison of the difference of the cost of construction of producing the same results from this locality and other localities?

633

A. Yes.

Q. But that estimate of the difference in cost was not based on a reservoir of the same size as the Ashokan?

A. Yes, same size.

Q. Do you know of any other place where the same sized reservoir—

A. The valuation was placed on the present size of 120 billion million. The other reservoirs were all different sizes, but in each case the same supply

634 capacity was taken as a whole. The system that I compared, the system east of the Hudson, the system pumping from the Hudson River, or the system of the Rondout and Catskill involved a supply of an equal amount per day.

Q. But it was not based on the actual existence of a reservoir at those places?

A. The reservoir was taken into account. Not actually in existence, but possible as reservoir sites.

Q. In your cost of construction you included the cost of dams and necessary construction work to impound the water?

A. Yes.

635 Q. And the cost of the aqueduct to the City line?

A. No, the cost of the aqueduct for purposes of comparison in the case of the Hudson River supply was only taken down as far as Hyde Park.

Q. That is on the other side of the river?

A. Yes. For the purpose of supplying East of the Hudson, the comparison was taken as far as Billings Reservoir, the South side of Dutchess County, in order to make the point of delivery the same as the point East of the Hudson.

Q. That was the same distance from New York City?

A. Yes.

636 Q. But on the other side of the river?

A. Yes, crosses the river at Storm King.

Q. In your cost of construction, how did you assume that the water would be carried from the West to the East bank of the Hudson?

A. Which comparison? In the comparison East of the Hudson?

Q. That was the Billings Reservoir?

A. Yes, that particular comparison, it was based on crossing the Hudson considerably higher up than the Storm King and crossing by five or six lines of steel pipes; laid in the bed of the river.

Q. It wasn't made upon the cost of construction as now being carried on by the Board of Water Supply? 637

A. No.

Q. As to the value of this property, is it a fact that the possible purchasers of this tract, for the purpose that you have assumed, are few?

A. Not many, there are not a large number of purchasers, but they are inevitable purchasers within a few years.

Q. So that you think the value is a present value?

A. Yes.

Q. I think you have testified that you do not know who the present owner is? 638

A. I do not, positively.

Q. Who employed you?

A. Mr. Alexander and Mr. William Sage, together; I do not know which is responsible for it.

Q. Don't you know that Mr. Sage is the owner of this property now?

A. I assume he is, I am so informed, but you are asking me to testify to something about which I have only secondary evidence.

Q. Do you know where he lives?

A. In Orange, N. J.

Q. You didn't ask him what he paid for the land?

A. No. 639

Took recess 10 o'clock to be resumed at 2 o'clock.

640

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT—NEW YORK COUNTY.

In the Matter

of

641

The Application and Petition of
JOHN A. BENSEL, CHARLES N.
CHADWICK and CHARLES A.
SHAW, constituting the Board
of Water Supply of the City of
New York, to acquire real
estate for and on behalf of the
City of New York, under
Chapter 724 of the Laws of
1905, and the Acts amendatory
thereof, in the Town of
Hurley, County of Ulster,
New York, for the purpose of
providing an additional supply
of pure and wholesome
water for the use of the City
of New York.

Ashokan
Reservoir.

Section 15,

Parcel No. 733.

642

WILLIAM SAGE, JR.,
Claimant,

vs.

THE CITY OF NEW YORK,
Petitioner.

New York City, N. Y., March 20, 1911.

The Commission convened at 2 P. M., pursuant
to adjournment, at Room 700, No. 47 Cedar Street,
New York City.

Present—Hon. GEORGE E. WELLES, Chairman;
 Hon. FRED H. PARKER,
 Hon. GEORGE W. BATTEN,
 Commissioners of Appraisal.

643

APPEARANCES:

ARTHUR S. BARNES, Esq., for the Corporation Counsel of the City of New York.
 EDWARD A. ALEXANDER, Esq., for claimant, Wm. Sage, Jr., *In re* Parcel No. 733.

Redirect-examination—By Mr. Alexander:

644

Q. Mr. Vermeule, you were asked a lot of questions concerning the weight which you would give to the selling price of similar parcels of land in estimating the market value of this particular parcel of land. Would not the existing conditions have a great deal to do with the question as to whether or not the past selling prices of land had any value whatever on the present value of land?

A. Undoubtedly, I have known conditions to change so that previous selling value should have no weight at all.

Q. Take Thirty-fourth Street, New York City, as an illustration. Ten years ago a large part of that street was residential section?

645

A. Yes, sir.

Q. Where you would buy a house and lot for \$50,000 and when the locality changed from a residential section to a high class business section, prices went up, in your experience?

A. Yes, same as 42nd Street.

Q. Take long Island. A lot of the land sold as acres, farms, were turned into villa sites, were they not?

A. Yes.

646 Applying that same horse-sense, and not the mathematical process referred to by Mr. Barnes, to this site question, has the demand for water become greater from time to time and reservoir sites less, and does this particular site enhance in value because of that?

A. Unquestionably, it did. All available good reservoir sites have enhanced in value within ninety to one hundred mile from here, materially.

Q. Would you say that the sale price of a house and lot on 34th Street, ten years ago, would be any evidence of the value of identically the same property there to-day?

647 A. Not at all.

Q. And any man of ordinary horse common sense would know that?

A. He ought to.

Q. And the same would apply to Long Island real estate?

A. Yes.

Q. Long Island farms that have been incorporated into New York City?

A. Yes.

Q. They went up enormously because of change in conditions?

A. Yes.

648 Q. And have not the water conditions in all the cities of the Hudson Valley, and New Jersey and close proximity to New York City, in the past few years has not population increased very materially, and has not the demand for water become greater and greater daily?

A. Decidedly.

Q. You were asked whether you employed a mathematical process. As a matter of fact, in estimating the fair and reasonable market value of Parcel 733, you used that process merely as an instrument, did you not?

A. Yes, it did not affect my judgment.

649

Q. In exercising your judgment, you took into consideration your past experience for 25 years, did you not?

A. Yes.

Q. And the study you had made of the property?

A. Yes.

Q. And you used your experience and reasoning power to estimate what would be the fair and reasonable market value of the property, did you not?

A. Yes.

Q. You took into consideration all the elements of value?

A. I did.

650

Q. And a considerable element of value in the property was the fact that it was a reservoir site?

A. Yes.

Recross-examination—By Mr. Barnes:

Q. You say you used this mathematical process as a check on your judgment?

A. No, I used it as an aid to my judgment, simply as a tool to arithmetically figure it out.

Q. Find out what it was?

A. Yes.

Q. You could not have testified to the amount here without doing that?

A. No, that was part of the process.

651

Q. You said that you did not think that the selling price of property, in the neighborhood of 34th Street, ten years ago, would be any indication of the value at the present time?

A. Yes.

Q. Do you think that the selling price of property in that same locality within the last month would be any indication of the market value of property in that locality?

652 A. It might be. It would all depend upon the circumstances surrounding the sale.

Q. You think that there might be circumstances surrounding the sale which would render it a fair criterion of value?

A. Yes.

Q. But before you could determine that any amount would be a fair criterion of value, you would have to investigate the circumstances attending the sale?

A. Yes.

653 Q. You testified on your direct-examination that horse sense led you to a conclusion that the sale price ten years ago would not be a criterion of value to-day, is that correct?

A. That is true, substantially.

Q. Using that horse sense, did you compare it to expert witness sense?

A. Mr. Alexander used the term.

Q. You do not agree with him?

A. I gave the answer which I thought correct.

Q. Do you mean that that horse sense is the sense of a real estate expert?

A. I understand that that is the ordinary common sense.

Q. And the sense that a man has that has had experience along a particular line?

654

A. Yes.

Q. You have stated that you have known of reservoir sites to have increased in value, is that correct?

A. I say that they have increased in value.

Q. How is that increase evidenced?

A. By the higher price which has to be paid to get them.

Q. You say a "higher price." What is your comparison?

A. As compared with former years.

Q. The same places?

655

A. In the same locality.

Q. You know of specific instances where property has been bought for a particular purpose, and then sold for a reservoir site and brought a higher value?

A. I know of cases where reservoir sites have cost more than they would have cost fifteen years ago, and have advised where they would cost more fifteen years hence.

Q. That would apply to all lands within a radius of 15 miles of New York City?

A. No, there is land that will never increase in value.

Q. What particular locality do you refer to?

656

A. Most all the hills and woodland along the Blue Mountains and Shuangunk Mountains, Sussex County, New Jersey, Orange and Ulster Counties. There has been no substantial increase in those lands—swamp lands.

Q. You make that statement from a knowledge of sales?

A. Yes.

Q. Did you make an investigation of the sales of Ramapo?

A. No.

Q. As testified to by Mr. Nostrand in this proceeding?

657

A. No.

Q. You have made no investigation of sales in that locality since?

A. No.

Q. So that in this particular locality your knowledge is not based upon any particular knowledge of sales?

A. Not in this exact locality, except that I know that increased demand always makes increased prices.

658 Q. If you had been figuring the price of this reservoir ten years ago, would you have used the same process?

A. Yes. I would not have gotten the same result.

Q. Why not?

A. Because we are all the time getting the nearer to the time when it is to be used for reservoir purposes.

Q. The prospect of use for reservoir purposes?

A. The prospect of use within a reasonable time.

659 Q. This figure that you have given as a fair market value and that you have testified is the fair and reasonable market value of the land embraced in Parcel 733, as of what time is that fixed?

A. It has been much the same within three years, I should say.

Q. You do not think that in three years there has been any increase?

A. Not materially; practically the same.

Q. And prior to that, for a period, there had been an increase, is that correct?

A. Yes, there is a constant increase, tendency to increase, but it doesn't become material until a certain number of years have passed.

660 Q. Had the value of this land reached its maximum about three years ago?

A. No.

Q. About three years ago you state that it had reached its value of \$57,000?

A. Yes.

Q. And was that value the result of a gradual increase, or a sudden increase at a particular time?

A. I should say a gradual increase. Perhaps the evidence of it had become more apparent to almost everybody. The increase itself, unquestionably, had been gradual.

Q. And that was about three years ago it reached this value?

A. About that, yes. Substantially the same for about three years. 661

Q. So that if this land were bought and sold at a time intermediate between the present time and three years ago, at a price less than that, you would think the land brought its full market value?

A. I would not.

Q. You do not know whether the land has been transferred within that time?

A. No.

Q. Would it have any bearing on your judgment if that land had been transferred three separate times within that period?

A. No, not unless the seller and purchaser had more information than I have. 662

Q. Would the fact that the parties selling the land had lived in that locality during the entire period and had actual knowledge of the taking of that land for water supply purposes, have any bearing on your opinion of value?

A. No.

Q. As a matter of fact, you fix this price as a result of your own mathematical calculation?

A. In aid of my judgment.

Q. What is the fact of this judgment that you speak of?

A. Full knowledge of conditions in this part of the country, and experience—that is, water supply matters. 663

Q. So that this land was worth that price to the City of New York?

A. Worth that, not only to the City of New York but to anyone.

Q. To any private water company?

A. Yes, anyone who would be in a position to hold until he realized.

Q. You mean an individual when you say a purchaser?

A. Yes.

664 Q. An individual purchasing this particular lot, and not the entire site?

A. Purchasing this lot, yes, and keeping in view its relation to the site.

Q. And if he purchased at this price it would not be worth more to him until some future time?

A. Why, I think it would be worth more to him at the time, or he would not buy it.

Q. But if he paid this very price, which you say is the fair market value, he would be paying all that it is worth?

A. No, I have not given any figures which are all that it is worth, except the intrinsic value; the market value is not all it is worth.

665 Q. You distinguish between the intrinsic value and the market value?

A. Yes.

Q. How do you make the distinction?

A. I think it is fully explained in my testimony. Anyone who wants 250 million to 500 million gallons a day, could get it that much cheaper in equal quality and equal advantages of elevation, than he could get it in other locations.

Q. That is the intrinsic value?

A. Yes, sir.

Q. What is the fair market value?

666 A. It is based on a purchaser buying it and holding it until he can sell it to the party, until he can get the intrinsic value out of it, or can hold it himself and get the intrinsic value out of it.

Q. That is, the intrinsic value is a speculative value?

A. I do not consider it a speculative value, no.

Q. It is not a present value?

A. Yes, it is the present value. It is a value based upon a much larger value in the future.

Q. If one buying it held it until it was worth the intrinsic value, isn't that a future value?

A. The intrinsic value is a future value.

667

Q. It is contingent?

A. It is contingent only upon being able to make use of it for that purpose.

Q. The intrinsic value is not there until it is used for that purpose?

A. The intrinsic value is not there until it is used for that purpose, no.

Re-redirect-examination—By Mr. Alexander:

Q. That market value is not its value to the City of New York, is it?

A. Not at all.

Q. Its value to the City of New York would be more than 34 million dollars, would it not?

668

A. Unquestionably it would.

Q. Commissioner Chadwick as a witness here testified, basing the sale of water at \$65 per million gallons, the City will derive an annual net profit from this enterprise of from \$10,000,000 to \$11,000,000 a year. He further testified that the City would obtain enough profits from the sale of water from this reservoir, after the reservoir has been completed, to pay for the entire expenditure of money that the City is investing here, within ten years after the aqueduct is completed, and forever thereafter the City would realize a net annual income of \$11,000,000 per annum. Mr. J. Waldo Smith, the Chief Engineer, testified that there will be about \$161,000,000 expended in completing this reservoir and aqueducts up to the City Line.

669

Do you know the cost of construction of the dams and dikes necessary to make a complete reservoir of the Ashokan Reservoir site?

A. Yes, I have looked over the estimates, I do not carry them all in mind—I am familiar with them.

Q. It is approximately, 29 million dollars?

670 A. 29 million dollars.

Q. So that, 29/161 of \$161,000,000 would estimate, approximately, the net profits to be derived from the Ashokan Reservoir site?

A. From the investment in the Ashokan Reservoir site.

Q. Approximately 3/16ths of 11 million dollars per year, which would give over 2 million dollars per year to be derived from the investment of 29 million dollars in this site. 2 million dollars capitalized on a 5% basis, would be what?

A. \$40,000,000.

671 Q. \$40,000,000 then, will approximately be the intrinsic value of that site, would it not, on Commissioner Chadwick's figures?

A. On his figures it would be more than that. That would be the return on the investment on that particular site, but really that site is so much a factor in the whole Catskill development that it should have apportioned to it more than that part of the profit. The other appurtenances are not so essential; it can be located in many places, but you can only use that one place for the reservoir.

Q. So that, more than the proportionate profit—29 and 161—ought to be credited on this reservoir site?

672 A. At least twice that.

Q. So that on his figures, even selling water at \$65 per million gallons to the inhabitants of the City of New York, this reservoir site would have an intrinsic value in the neighborhood of 80 million dollars?

A. Yes.

Q. In the sale of water to-day to the inhabitants of New York City is \$65 per million gallons cheap or dear?

A. Very reasonable price, very cheap.

Q. As a matter of fact, the water is sold at the rate metered of \$133 per one million gallons?

673

A. It is.

Re-recross-examination—By Mr. Barnes:

Q. If you had based your calculations upon Mr. Chadwick's figures you would have gotten a higher market value on this particular property?

A. Undoubtedly.

Q. You didn't think it was proper to do that?

A. I did not do it; I did not pass on the propriety of it.

Q. I mean a proper way to arrive at the value?

A. I thought the way I used was the best way.

674

Q. Is this the first time it has been called to your attention?

A. No, I thought of that before.

Q. But you rejected that plan?

A. No, I made some use of such a plan. It simply raises more questions as to what is the proper price, but I have not any doubt that such a plan would lead to higher figures than mine.

Q. You do not think there is any question that this amount that you have testified to is a proper price?

A. There is no question that that is a conservative value.

Q. The other would raise more questions?

675

A. The other would raise more questions as to what was the proper selling price of the water. That is a very big question.

Q. I am speaking about the selling price of the land?

A. I do not know what you mean exactly.

Q. Arriving at your conclusion of the fair market value of this land included in Parcel 733, you have not used a method based upon Mr. Chadwick's figures?

676 A. No, I have not.

Q. You considered the use of that method and rejected it?

A. In this particular case I did not consider it. I concluded that the best method I knew of would be to ascertain how much the City would save by adopting this site as against other locations.

Q. And this amount that you testified to is the result of that conclusion as to how much they would save?

A. Yes.

Q. So that if they have to pay this amount they are no better off than if they had some other site?

677 A. My calculations put them all on a par as to purity of water and delivery of water, so that they would get the same results from different supplies in qualities of water delivered and everything else.

Q. From each source?

A. Yes.

Q. So that rather than have one reservoir you have a number in competition?

A. Yes, practically we have a number of sites competing.

Q. You have bought and sold real estate?

A. Yes, certainly.

678 Q. When there are a number of pieces of property suitable and available for the same purpose that are in demand, in your opinion, does the price go up or down?

A. It depends upon whether there is too much demand or too many properties. If there are too many properties, it goes down.

Q. This amount that you have testified to as the fair market value of Parcel 733 is the value of the land embraced in that parcel used in connection with the rest of the reservoir site?

A. Yes, practically.

Q. The value of the land embraced in Parcel 733 would have been, in your opinion, the same, not considering it used in connection with other land embraced in the reservoir site? 679

A. It was considered as an essential part of a reservoir site.

Q. And the calculation was based upon an assumption that it was used in connection with the other land?

A. Not absolutely in connection with all the land, but some substantial part of it—enough of it to make a reservoir site.

Q. That was essential to your computation and result, wasn't it?

A. Yes. 680

Redirect-examination—By Mr. Alexander:

Q. In other words, in valuing the land, you took into consideration the fact that it was a part of a reservoir site?

A. I did.

Q. And that, together with other contiguous parcels, it would be capable of forming a reservoir site?

A. Yes.

Q. As a matter of fact, you could construct a number of different reservoirs in the Ashokan Reservoir site?

A. Yes. 681

Q. But there was a demand for a reservoir large enough to store the entire yield of the Esopus watershed and also a large part of the yield of the Schoharie watershed, is that not true?

A. Yes. The Ashokan site must be used to the extent that it is proposed to use now, in order to properly develop the Catskill supply. It cannot be done otherwise.

Q. By using the Ashokan Reservoir site to the extent of its complete storage capacity, the most economical development would result, would it not?

A. It would.

682. ROBERT E. HORTON, called as a witness for the claimant, and being first duly sworn by the Chairman of the Commission, testifies as follows in regard to Parcel No. 733:

Direct-examination—By Mr. Alexander:

Q. Where do you reside?

A. Albany, N. Y.

Q. What is your profession?

A. Hydraulic engineer.

Q. What experience have you had as a hydraulic engineer?

683. A. Well, I have been continuously engaged in hydraulic engineering work for the past fifteen years, or thereabouts, and in connection with water supply, water power and canals, have been consulting engineer for several corporations on water supply, for several municipalities on water matters, have been consulting engineer of the Geological Survey during 1900 to 1906.

Q. The United States Government?

A. On investigations of the flow of streams, on other matters, including investigation and gaugings of the then proposed new sources of water supply of the City of New York in the Catskill region, including Esopus, Catskill, Rondout Creek and other streams.

684. From 1906 to date, I have been resident engineer of the New York State Engineer Department in connection with the Barge Canal construction, and in connection with matters of storage, water supply and canals. I have been consulting engineer of a large water works corporation that supplies the City of Utica and adjacent towns. This company is the Consolidated Water Company of Utica, New York. I have nearly completed a valuation of their entire property, including some eight reservoirs and a number of additional reservoir sites, and have had to do in that connection with negotiations for

the purchase of reservoir sites and lands to be used for reservoirs. I have advised with various State officials engaged on that work in connection with proposed development of storage reservoirs in the Adirondack regions by the State, and questions of proper method of valuing lands in the reservoir sites owned by the State, and other similar matters.

685

I have testified in a considerable number of cases and litigations involving questions of the value of water, water rights and water power and reservoir sites, made investigations for the development of various reservoirs.

Q. Since 1898 were you engineer on construction of Indian Lake Storage Reservoir?

686

A. I was assistant engineer on construction of Indian Lake Storage Reservoir. That is a large reservoir in the Adirondack Mountain region, located on the headwaters to a tributary of the Hudson River, a reservoir storing about 3,100,000,000 cubic feet—more than that, about 4,500,000,000 cubic feet, about thirty billion gallons.

Q. Have you had to do with devising general plans for two large storage reservoirs, one at Hinckley, having a capacity of 3,455,000,000 cubic feet, and one at Delta, having a capacity of 2,750,000,000 cubic feet?

A. Yes. Those are large reservoirs which are now being constructed as sources of water supply for the New York State Barge Canal. I had something to do with the general features of both of those reservoirs from practically their inception down to the time when the contracts were let.

687

Q. For what purpose do they intend to store the waters in these reservoirs.

A. To supply the summit level and the large canal with water.

Q. Do you know whether one of the propositions being considered by various parties interested in

688 the question of construction of storage reservoirs on State lands, is to rate flowage ground for such reservoirs on the basis of the value of the lands for reservoir purposes?

A. I know that that is one of the methods that is being considered by State officials.

Q. Is there any objection to naming the State officials considering that?

A. I prefer not to name them. That is not yet decided.

Q. They are State officials having power to act in the premises?

A. Yes.

689 Q. Presumably in the Department of the State Engineer?

A. No. Some of them are higher up than that—having to do with the legislative end of it.

Q. Are you familiar with the Esopus watershed?

A. I am.

Q. How long have you been familiar with that watershed?

A. Beginning in 1901, I made many examinations of the Esopus watershed at different times from 1901 up to the present time.

Q. For what purpose did you examine them?

690 A. I made a general examination, spent a week or ten days on the Esopus watershed in 1901, just to become familiar with it and with the water, storage possibilities and the conditions affecting the yield of the stream, and to select places where gaugings could be made. I made subsequent examinations in 1902, 1903, 1904, 1905, in the same connection, and then visited the watershed, I think, next after that, in 1907 or 1908, and several times subsequent in connection with claims for water power damages, arising from the construction of the Ashokan water supply.

Q. Now, you were employed by me to examine

the William Sage, Jr., property, being Parcel 733, before this Commission, were you not? 691

A. I was, yes.

Q. Did you in conjunction with Mr. Edwin Burhans examine it on or about February 22, 1911?

A. I did examine it on February 22, 1911.

Q. Did you make an estimate of the fair and reasonable market value of this property?

A. I did.

Q. You are not familiar with its agricultural value, are you?

A. Only to a limited extent; I do not consider myself an expert on the question of its agricultural value. 692

Q. You do not consider that element of value in the property as amounting to much?

A. I consider that that might amount to considerable, but that is not the only value, nor is it the controlling value; hence it was not necessary to determine or know its agricultural value with a high degree of precision.

Q. But you thought it did have a considerable agricultural value?

A. Yes.

Q. What, in your opinion, on or about May 22, 1909, the date on which the City of New York took title to Parcel 733, was the fair and reasonable market value of that property? 693

A. About \$660 per acre, being, as I recall, about 86 acres.

Chairman: It is 86.49 acres.

A. (Continued.) I would make the aggregate about \$57,083.40.

Q. In estimating this value, you did this on your own independent judgment?

A. I did, yes.

694 Q. You did not consult with Mr. Vermuele, the last witness who testified?

A. I have not at any time.

Q. Upon what basis did you come to the conclusion that the fair and reasonable market value of this property was \$57,083.40 at the time when the City took title to it?

695 A. In answering that question, I would say that I used two different methods. In the first place, I made an estimate of its value, based chiefly upon my own judgment, without any elaborate calculations of any kind, but taking into account the average awards which I was informed had been paid by the City for lands taken in the Ashokan Reservoir, and taking into account as nearly as it could be determined from the City's published estimate of cost, the price at which the City appraised these lands for purposes of condemnation, not including their special value for the purpose of a reservoir site, but merely including their value for agricultural or residential purposes. I found, from that data, that the average value for those uses, exclusive of value for reservoir purposes, was \$330 per acre throughout the Ashokan Reservoir site. From my own knowledge of the acquisition of land for reservoir purposes and their value for reservoir purposes, I was of the opinion and formed a judgment that such lands would be worth, substantially, twice the amount for reservoir purposes as a fair market value where the reservoir utility was the highest utility of the lands that they would be worth for other purposes. Multiplying \$330 by two gives me \$660 per acre, which is the figure which I finally used.

696

I made an independent estimate of the value of the land for reservoir purposes on an entirely different basis, which consisted essentially in determining how much a private corporation, or indi-

vidual, having a market for the water which could be supplied from this drainage basin at a fair rate or at a rate less than it would cost the City, could afford to pay for these lands for reservoir purposes and at the same time do business at a reasonable and substantial profit. In other words, I considered that at the time of the City's appropriation there were lands which could be purchased or acquired, and I attempted to determine how much a private corporation should have paid for those lands if it had sought to purchase them at a fair market value and how much the owners of the land should have demanded and could reasonably expect to receive, at the hands of any willing purchaser for those lands for reservoir purposes. That method of arriving at the value of the lands, involved, of course, an estimate of the cost of developing a supply and delivering it to a market; and, insofar as possible, in making my estimate of the cost of developing the supply by private enterprise, I utilized as a basis the City's cost of development of a municipal enterprise, modifying the City's estimate wherever, in my judgment, it did not conform with the cost to a private enterprise engaged in the same development. 697

Q. Your estimate was based on the assumption that the thing to be determined was the fair and reasonable market value of this property? 698

A. It was, yes.

Q. And in determining that you had to take into consideration not the use which was being made of the lands at the time when the City took title, but the best use or best utility to which this parcel could be put? 699

A. Yes, I considered that the fair market value of the lands, or of any lands, was determined not necessarily by the use hitherto made of those lands, or being made of them, at the given time, but rather

700 by the best reasonable and available use to which they could be put.

Q. What, in your opinion, was the best reasonable and available use to which these lands could be put on May 22, 1909?

A. Unquestionably, in my mind, the best available use to which these lands could be put was for flowage purposes, for reservoir for water supply.

Q. Was there a demand for water, both by the City of New York and by a large number of other communities along the line of the Hudson, on or about May 22, 1909?

A. There was.

701 Q. Had that demand existed for a long period of time prior to May 22, 1909?

A. It had, especially as regards the City of New York, to some extent as regards smaller communities.

Q. Has that demand for water increased covering a long period of years prior to May 22, 1909?

A. The requirement for water had continually increased, from time to time, and steps have been taken to meet the demand; but it has never been fully met, and the demand has increased as well as the requirements.

702 Q. Did the supply for meeting that demand increase or decrease from time to time, as available reservoir sites were taken out of the market?

A. Decreased to some extent.

Q. Did not the cities in New Jersey, in close proximity to the City of New York, need water and take up available reservoir sites surrounding them?

A. Yes.

Q. Did not the City of New York, from time to time, since 1825, absorb all the available reservoir sites within apparent close proximity to the City?

A. Well, I do not know that it absorbed all of them, but it absorbed the larger and better and

more feasible water sites, that were adequate to supply the municipality of the City of New York. 703

Q. It took the Croton supply?

A. Yes, sir.

Q. It absorbed the Byram Pond?

A. Yes, sir.

Q. It absorbed all sources of supply in Westchester County, did it not?

A. Excepting such small sources that were necessary to supply local communities. In fact, I think my statement too strong, that were not adequate to supply small communities.

Q. And the next available source was the Ashokan reservoir and the Schoharie and Rondout? 704

A. That is the next available and feasible source of gravity supply. Of course, the source from the Hudson by pumping and filtration can be obtained, but that is less feasible. There are other sources that are available, but are in question—Housatonic River and possibly from Walkill and Delaware Rivers, which are, to a certain extent, interstate streams. Those supplies are feasible but are not available, because of interstate complications.

Q. The cities of Albany and Troy have also been absorbing all the available water sites for the purpose of supplying water to themselves? 705

A. The City of Troy has absorbed practically all the available reservoir sites. The City of Albany investigated all the available reservoir sites extending down to the Catskill streams, now being taken by the City of New York, contemplating, at one time, to take those same Catskill streams, but abandoned that project because of its cost, and finally adopted the supply from the Hudson River by pumping and filtration at great cost.

Q. The waters of the Hudson up at Albany are comparatively pure?

706

A. No, I do not consider the waters of the Hudson River, below the point where it leaves the Adirondack region, as comparatively pure; the less said about it, the better. Albany filters it twice.

Q. The cities of Yonkers and White Plains, Westchester County, have been absorbing all the sources of water supply they could?

A. I am only familiar with their sources of supply in a general way. I could not testify what they have been doing.

Q. You have read it in the public print that they are looking for water?

A. Yes, as it appeared in the Technical Press.

707

Q. The City of Kingston was investigating this water site at one time?

A. I believe so. It has investigated various sources.

Q. But the demand for water for years and years had been continually increasing as the population increased in these various cities?

A. Yes, it increased more rapidly than the increase of population.

708

Q. Would you say that the absorption of these various reservoir sites, within the immediate proximity of Yonkers, White Plains, Troy and Albany, N. Y., and the various cities in New Jersey and other cities and places, increasing the demand for water, had enhanced the value of reservoir sites without the State?

A. I would consider that it had enhanced the value of reservoir sites, locally, within a radius of New York. Throughout the State generally, there is a notable increase in reservoir sites within the past ten or fifteen years.

Q. What has been the cause?

A. In part, increased urban population and increased use of water, per capita; in part, a better appreciation of the value and necessity of supply-

ing pure water; in part, the increasing value of reservoir sites has resulted from a general extension of water power development and the extension of storage for the purpose of increasing water power. Reservoirs are now considered feasible in many localities where they were not thought of a few years ago. 709

Q. And has not this subject of conservation of our natural resources been a subject of live discussion on the part of the President of the United States and Congress in recent years?

A. Yes.

Q. A parcel of land that would be worth \$100 per acre for agricultural uses might have the same value for reservoir purposes, as another parcel of agricultural land that might have been worth \$500 per acre for agricultural purposes, might it not? 710

A. That is true, there is no uniform or definite relation as regards any parcel between their value for other uses and their value for reservoir purposes. Of course, it is not feasible to build a reservoir where the average value of the land, flowed, is greater for other purposes than reservoir purposes. On the other hand, where the value of the land for reservoir purposes exceeds its value for other purposes, then its value for other purposes does not determine its market value at the time it is acquired for reservoir purposes. That rule is not invariably followed in the acquisition of land privately. Of course, one person desiring to purchase lands for reservoir purposes acquires it as cheap as he can for residential or agricultural purposes. 711

Q. And, even under that value if he could get it?

A. Yes, of course.

Q. So that the question, how much a person pays for lands, is not of much value?

A. I think it has very little bearing, what prices have been paid.

712 Q. Parcel 733, the Sage property, lies near the flow on land?

A. Part of it will be flooded, and part will not be, by the proposed reservoir.

Q. The fact that part of the land will not be flowed does not materially decrease the value of this land, does it?

713 A. No. It is necessary in acquiring the land for a reservoir to acquire somewhat more than the net area flowed, for two reasons—one reason is, that the boundaries of farms or parcels will not actually coincide with the boundaries for the flowed area, and it is as cheap to purchase the whole farm as three-fourths of the farm, with buildings detached and inaccessible; another reason is that, it is necessary to purchase some land outside of the flowage to provide accessibility and also to provide for sanitary protection.

Q. It is absolutely indispensable to acquire lands for accessibility to the reservoir?

A. That is true.

Q. Or you could not take care of the reservoir?

714 A. In certain seasons of the year, it is impracticable to make sanitary inspection of the reservoir unless there is some control of the margin lands. As a rule, it is my experience that it is found necessary to acquire about one and a half times the amount of land actually flowed.

Q. In the course of your experience as a hydraulic engineer, have you become informed as to whether or not certain States in the Union do not recognize reservoir land as more valuable than the same land for agricultural purposes.

A. I understand that they do.

Q. Is there an act of Legislature in Connecticut relating to this subject?

A. I believe that there is.

Q. Will you state what that provides?

A. I am familiar with the so-called Mill Acts of the States of Connecticut, Massachusetts, Maine, and have read them several times, but not recently. I know that those Mill Acts provide that certain lands may be taken subject to certain conditions for the reservoir purposes, and defining the terms and rules that shall guide the Commissioners of Condemnation in acquiring those lands. And I have been informed, that in Connecticut, that there is a rule that an additional allowance over and above ordinary agricultural value, shall be made. 716

Q. How much is that allowance?

A. That is stated to me as one and one-half times the value of land for other purposes. 716

Q. That is, in Connecticut, reservoir land is first valued at its fair and reasonable value for agricultural purposes, and that value is multiplied by one and a half and added to the agricultural value?

A. So I understand. I do not know that I have ever seen that act of the Legislature, but I have conferred with engineers and others.

Chairman: Then the value for reservoir purposes would be three-fifths, assuming agricultural purposes two-fifths.

The Witness: Yes, sir.

Q. Are you familiar with the method of valuing reservoir lands in the State of California, the well accepted and adopted method? 717

A. No, I do not think I am.

Q. Montana and other Western States?

A. No, I do not consider that the methods there used would have bearing on the conditions here.

Q. Assuming that in California and a number of the other of the Western States, they value reservoir lands as upwards of five times its agricultural value, in your opinion, would that fact have any bearing in estimating the value of this property?

A. Not very much.

718 Q. The fair and reasonable market value of 733 might be estimated on the basis of an additional amount that would be required to secure an equally good supply from another source?

A. Yes, that would be one method of ascertaining the price.

Q. In other words, the saving to the City of New York effected by the City in taking this site, being the most economical over and above the next cheapest available site, is that right?

719 A. That is the method. And in many instances it would be a substantially correct method. There are cases, however, where that method could not be used, because no reservoir site could be commercially developed unless it was commercially feasible, and if the next best site was not commercially feasible the two could not be compared.

Q. You did not use this method in this case?

A. I did not use it, although I considered it could have been used.

Q. Why didn't you use it?

A. Partly, time limitation and lack of data to make the comparisons in the full completeness that I would have desired.

Q. As a matter of fact, is there as good a source of water supply available?

A. There is not, in my opinion.

720 Q. So that that method, if used, would be much more liberal and much more in favor of the City of New York, would it not?

A. I do not think that it would necessarily. I think that that could be made a perfectly fair method to both parties by modifying the estimated cost of water from other sources to take into account all water from other sources. If that was done, it would not be proper to say that that method was more liberal to the City than any other method. It would be a fair method.

Q. If you modified the waters from another site, the modified water would not be as good as this Catskill water? 721

A. It might be, technically. Naturally most of us would prefer pure water to one that has been inhabited and disinfected.

Q. And naturally this water would be best for the City of New York?

A. I could not answer that question yes.

Q. In estimating the fair and reasonable market value of a parcel of land, under that second method, you could not add to that land all the savings to the condemning party and attribute all those savings to this particular site, could you? 722

A. I would not consider it proper to do so.

Q. Because that would be its value to the City, would it not?

A. That would be substantially its value to the City.

Q. But you could consider a substantially small percentage of the savings to the City, as important to take into consideration and to add to the value of the lands?

A. Yes, you would allow what might be called a factor of safety, so to speak, in fixing the market value; that is to say, if there was reasonably good prospect that the thing could be developed and made worth a certain sum, but it had not yet been tried, then you could not sell the land for the full value it could have after it had been developed, because there is an element of possible risk, which would have to be taken into consideration, in all real estate appraisements; and it is for that reason that a distinction is made between the intrinsic value, so called, and the fair market value. That is one of the reasons. 723

Q. Where the demand for the water was a certainty, where you knew from a practical engineer's

724 standpoint, that the works could be constructed for a certain amount, where you knew that the price of the water was fixed and certain, at a certain price, and would probably increase from time to time, do you consider that there is much of a risk in a transaction of that kind?

A. No, I would not consider that there was very much possible risk, but I would still consider that the undeveloped property has a less value than its developed value would be. You could not borrow money on the basis of its developed value. There must always be a margin of safety in arriving at the value of an undeveloped property.

725 Q. What is the third method that it is reasonable to use in arriving at the market value, taking into consideration the reservoir?

A. I have spoken of three methods. I will enumerate them briefly. The first is from judgment and experience in acquiring lands for reservoir purposes. The second is from an estimate of what a private purchaser could afford to pay for the reservoir site and still obtain a reasonable profit from its development as a private enterprise, regardless of the City using it; and the third, from its feasibility, that is, its value arrived at by considering the cost of development and the result obtained, as compared with the cost of development and results obtained from the next best source.

726 Q. Did you have any experience in connection with the purchase of about 3 thousand acres for flowage ground for a water work?

A. Yes, I did, at Grey, for the Consolidated Water Company of Utica; Adirondack region.

Q. Did you purchase it?

A. Not directly. I was advisory engineer, and worked continually with the lawyer until the acquisition of the water works site; advised him as to the lands to be purchased, what the company could

afford to pay for them, and methods of procedure in acquiring the lands.

727

Q. What experience did you have?

A. As to cost of the lands?

Q. Yes.

A. In that instance, the water company paid about from three to five times the value, per acre, for agricultural purposes. They bought the lands for reservoir purposes. They had the power of condemnation, but to avoid condemnation, they acquired the lands quietly, and at least expense. They purchased the land outright and were able to purchase without condemnation, at prices averaging from three to five times the value of the land for agricultural purposes. The lands had practically no value for agricultural purposes. The lands were mostly swamp lands covered with timbers, but the purchase was made in such a way that the company paid, perhaps, twice their value as timber lands, plus their value for agricultural uses.

728

Q. In the first Annual Report of the Board of Water Supply of the City of New York, is the land in the Ashokan Reservoir site valued at \$330 per acre?

A. Yes, a lump sum value is given for (15) fifteen thousand acres of land, and for re-locating highways and railroads; and dividing this up into the three separate items of lands, highways and railroads, at a fair price, gives the estimated value of lands at about \$330 per acre.

729

Q. At this valuation, this special value of the lands, for reservoir purposes, was not included, was it?

A. I understand it was not,—not stated to have been.

Q. That value was based upon the residential and agricultural value of the property to be taken?

A. Yes.

730. Q. And exclusive of condemnation expenses, that has been the approximate amount, the average amount of all the awards to date, is it not, about \$330 per acre?

A. I am so informed.

Q. So that, most of the condemnation commissions followed the City's advance estimates very closely?

A. The advance estimate was not given as a price per acre, so that I could not fairly say that it was figured out and followed by anyone.

Q. It is a coincidence?

A. I think it is a coincidence,—close estimate.

731. Q. Now, in your opinion, could the Ashokan Reservoir water supply be developed by a private enterprise as a paying and profitable investment if an average price of \$660 per acre was paid for the lands? Could that private water company furnish water to the City of New York on that basis at somewhat less than this water will cost the inhabitants of the City of New York, after the City's own plans has been followed, and this water works constructed on the City's own plan?

A. In my opinion, it could be. Assuming that the City had not gone ahead and taken this land but had left it to private enterprise, private enterprise could have purchased this land at \$660, and could have delivered the water to City Line at lower than it cost the City of New York and made 6% on their entire investment and 5% on their bonds.

732. Q. Now, you have made up an estimate on that basis, have you not?

A. I have, yes, sir.

Q. I now show you four blue prints and ask you whether your estimates have been made upon these blue prints?

A. The details of my computations and of my

estimate of the cost of the development of the Ashokan water supply supply, by private enterprise, are given on two of these prints.

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Prints referred to marked A and B.

A. (Cont'd.) The blue print marked "A" contains my estimated cost of the development of the Ashokan Reservoir by private enterprise, as compared with the City's estimated cost of development of the same water supply.

Blue print "A" shows the estimated operation expenses of supplying water at City Line from the Ashokan Reservoir, by private enterprise, and in comparison therewith an estimate of the cost of delivering the water at City Line with the reservoir works constructed by the City.

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Q. Will you explain the substance of those estimates, beginning with blue print "A"?

A. Referring to blue print "A", I first estimated the cost of constructing a reservoir substantially the same as the Ashokan Reservoir, by a private enterprise. I used as a basis of my estimate the City's estimate for the Ashokan dam and reservoir, complete, of \$29,177,000. From that I deducted \$5,250,000, which was included in the original estimate of the City, but afterward taken out of their estimate,—that being an item for stripping the reservoir bottom, removing soil, trees and other material,—leaving \$23,927,000. I then deducted 10% as an allowance for certain items of construction, which in my opinion, are not necessary and would not be included in the construction of a reservoir by private enterprise.

735

Q. Mention all those items?

A. One of those items was, an unnecessarily large allowance for ice thrust in the design of the dam, also reduction in core wall and embankment, omission of boundary wall, and general economy of de-

736 sign. I did not make a detailed estimate of the extent to which these respective items could be reduced, but simply took a lump sum of 10% as being, in my fair judgment, an amount which the estimated cost could be properly reduced. This amounts to \$2,392,700. In my opinion, 20% could be saved by construction of this dam and reservoir, by private enterprise, under private contract, eliminating certain features of union labor control, and working longer shifts, making \$4,785,400. I deducted 5% saving on general supervision and overhead expenses, \$1,196,350. Then I deducted the City's estimated cost of land and substituted a different figure, the deduction being \$4,710,000, making my total deduction \$13,084,450, leaving estimated cost of dam, exclusive of land, \$10,842,500. I added to this the cost of 15 thousand acres of land at \$660 per acre, or \$9,900,000, making a total estimated cost of dam and reservoir, by private construction, \$20,742,500. I then estimated the cost of an aqueduct of 250 million gallons capacity, leading from Ashokan Reservoir to Hillview Reservoir, at the City Line, starting with the City's estimate of the cost of an aqueduct of 500 millions gallons capacity, which is \$32,772,000. I deducted 20% saving on location and design, or \$10,554,000; 10% saving on private contract, \$5,277,200; 5% saving on supervision and legal expenses, \$2,638,600. I made a further deduction of 10% for elimination of deep tunnel stream crossing, aside from general economy of design, of \$5,554,000, making total deductions of \$24,023,800, leaving an estimated cost of 500 million gallon aqueduct constructed by private enterprise \$28,748,200. I estimate the cost of an aqueduct of 250 million gallons capacity to be about 75% of the cost of an aqueduct of 500 million capacity, making the estimated cost for 250 million gallon aqueduct \$21,561,150. I checked that esti-

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mate by an independent estimate based on the united prices for aqueduct of the different lengths proposed, given in Mr. John R. Freeman's Report on the New York Water Supply, made to Comptroller Bird S. Coler in 1900, and reached substantially the same result. I omitted the Kensico Reservoir altogether, as not being necessary to the development of the Esopus supply alone, but I have assumed that the Hillview Reservoir was constructed immediately to its full capacity of 2,030,000,000 gallons, instead of being constructed to the temporary capacity of 6 hundred million gallons, as proposed by the City at the present time, in conjunction with the Kensico Reservoir. In other words, I have substituted a much larger reservoir, immediately at the point of distribution, in place of two reservoirs, one very small one at City Line, and another at Kensico. My estimated cost of the Hillview Reservoir is \$7,904,000, making my total estimated cost of development of 250 million gallons, per day. supply, delivered at City Line, at elevation 300, where done by private enterprise, \$50,207,650,—roundly, \$50,000,000.

Q. What would that water be sold for at City Line, per million gallons?

A. The selling price at the City Line has not entered into my computations directly, at all. What it would be sold for, either by the City, or by private enterprise, would depend as much on the method of financing the business of selling the water, as it would on the original cost of development.

I next proceeded to estimate the cost of delivering this water at City Line (witness takes blue print "B"). The first item is interest on the investment of \$50,207,650 at 5%, amounting to \$2,510 282; dividends on \$50,207,650 at 6%, \$3,012,159; taxes at 1½% on the same amount, \$753,114;

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742 salaries, reservoir and conduit operation to deliver water at City Line, not to retail it, I have taken a lump sum of \$100,000; depreciation of valves and construction, that will depreciate, which will include concrete masonry or embankments, \$400,000; I have also allowed a sinking fund of $2\frac{1}{2}\%$, or \$1,255,180.

Q. Is it usually a custom to set aside a sinking fund in private water companies?

A. Not over and above interest on bonds, profit reserve. I allowed for a certain amount of reserve in addition.

Q. You are making this estimate extra carefully?

743 A. Yes. The effect of a sinking fund is that if one is provided in addition to dividends, if the dividends were usually 6%, it makes an increase to 8%, 10%, or 12%. The sinking fund is taken care of in increased dividends. Total value, \$8,431,135. That would be equivalent to a cost on the basis of financing the sinking fund, and on the basis of 250 million gallons per day, of \$92.39, delivered at City Line. This reservoir, utilizing Esopus Creek alone, and not taking in conjunction therewith the other streams, Schoharie and Catskill and Rondout Creeks, would be adequate to supply 300 million gallons per day, at a slightly increased cost, making the net cost \$80 per million gallons.

744 If the Sinking Fund was eliminated and the dividends remained the same, taking the Sinking Fund provision out and throwing it into the dividends, the cost, per million gallons, would be cut down to about \$70. On that basis the works would remain permanently in good repair, would permanently pay 6% dividend and would permanently pay 5% on construction cost, but the debt would not be wiped out, would be a standing debt of that amount.

Making the same kind of an estimate of the cost to the City of delivering 250 million gallons from

Esopus Creek alone, I have taken their estimate of the Ashokan dam and reservoir, \$29,177,000. Their estimate of the cost of an aqueduct of 500 million gallons capacity, reduced 25% to get the equivalent of an aqueduct of 250 million gallons capacity, would be \$39,579,000; Kensico Reservoir, \$12,919,000; Hillview Reservoir of 600 million gallons capacity, \$7,200,000. Total estimated cost of the works for Esopus Creek supply alone to the City, \$88,675,000. My estimate of operation charges to the City is as follows:

Interest on bonds, 4% on \$88,675,000,	\$3,547,000	
Taxes, which the City and State either pays or loses, 1½%,	1,301,000	746
Salaries, reservoir and conduit, taken at the same rate per million dollars investment, which I assume for private enterprise,	176,000	
Depreciation of valves, piping and depreciable articles, taken at the same rate per million dollars investment that I have assumed for private enterprise,	704,000	
Repairs, supplies and so on, taken at the same rate per million dollars investment as for private enterprise,	704,000	
Sinking Fund of 2½% on construction cost,	2,216,000	747
Total annual cost of operation by City,	8,648,000	

The total cost of operation by private enterprise, according to my estimate, was 8,431,135 for the same structures and for the same quantity of water delivered at City Line, at the same pressure, or about 200,000 less than by operation by the City, but allowing for 5% interest on the bonds instead

748 of 4%, as assumed by the City, and after allowing 6% profit or dividends, and after allowing for the payment of \$660 per acre for the land, if the construction was made by private enterprise, whereas in this estimate I have assumed that the City acquired the land at its own estimated figure, not including special value.

Q. As I assume the substance of these figures while the private water company would have an investment of approximately 50 million dollars, and the City would have an investment for the same work, of \$88,500,000, the cost of maintenance would be practically the same?

749 A. I have estimated the cost of maintenance at the same rate per million dollars invested in each case. Of course, the cost of maintenance is proportionate to the investment. The cost of maintenance would be larger on the works where the cost of investment is larger. I have allowed for that in making my rate, per million dollars, invested the same. The investment by the City being larger, the maintenance by the City is also larger, and I made it larger.

Q. In estimating the cost to the City, you didn't allow 6% profit to the City?

750 A. Didn't take into consideration the profit to the City. There might be no profit; there might be 20% profit. My estimate simply showed what it would cost the City on the basis of the City's own estimate to deliver the water at City Line. They may retail the water in the City so as to make a very large profit. I have simply assumed that the private enterprise had to sell the water at City Line and at as low a price as the City could deliver at City Line.

Q. You have considered that it would cost a private company \$80 per million gallons to deliver at

City Line, provided it impounded sufficient water to deliver 250 million gallons per day? **751**

A. Provided it impounded sufficient water to deliver 300 million gallons per day.

Q. And that included a profit of 6% on its actual investment?

A. Yes.

Q. Fifty million dollars would be three million dollars per annum?

A. The profit is \$3,012,000.

Q. Approximately three million dollars per annum?

A. Yes.

Q. So that the actual cost, exclusive of that profit, for the delivery of 250 million gallons, per day, by the private water company, delivered at the City Line, would be, approximately, how much? **752**

A. Five and a half million dollars.

Q. What would that make the actual cost of the water?

A. It would be about \$60 per million gallons.

Q. Do you know what the Ramapo Company proposed to sell water for to the City of New York, delivered at the City Line?

A. I believe that it is stated in one of the City reports that the proposed price is \$70 per million gallons.

Q. How much water did they propose to deliver at the City Line for that price? **753**

A. I do not remember.

Q. You never went into the question of the Ramapo Company?

A. I did not.

Q. Did you ever make any estimate as to the cost at which 500 million gallons of water could be delivered at City Line by a private water company?

754 A. No, I have not.

Q. Would it be cheaper or dearer than the delivery of 250 or 300 million gallons?

A. Judging by the difference between the City's estimate of 250 million gallons from Esopus Creek and 500 million gallons from several combined sources, I should say the cost per million gallons would be considerably less for 500 million gallons by either the City or private enterprise.

Q. Could you give us any reasonable approximate idea of the amount less?

755 A. No, I do not think that I could. It would involve quite an elaborate estimate to arrive at that. Speaking in a general way, I think it would be at least 5% or 10% less.

Q. 5% or 10% less than \$50 per one million gallons, or \$60?

A. 5% or 10% less than any figure. Whatever the cost was for 250 million gallons, then construction on the same basis and operation on the same basis for 500 million gallons supply would cost, per million gallons—I simply put that in a very general way—I should say 5% or 10% less, perhaps more.

756 Q. So that, if it cost a private water company or the City of New York, about \$45 for one million gallons to deliver this water at the City Line, and it sold the water to its inhabitants for \$65 per million gallons, making a profit of \$20 per million gallons, per day, that would be a profit of \$3,650,000 a year, on 500 million gallons of water. How do you reconcile that with Commissioner Chadwick's sworn testimony that the City of New York would make a net annual profit of ten to eleven million dollars per year?

A. Selling the water at \$65 per one million gallons?

Q. Yes.

757

A. On 500 million gallons?

Q. Yes.

A. I do not know what Commissioner Chadwick based his estimate on.

Q. Do you think he is too high?

A. I do not think that Commissioner Chadwick, or the Water Supply Commission of the City of New York, contemplates selling the water at retail at \$65 per million gallons. That figure is intended to apply to the cost at City Line. The present price in the City of New York, and cities generally, is very much in excess of \$65 per million gallons, and in any case, it is hard to determine the profit from the retail sale of the water, without knowing the cost of retailing it, which includes the interest on the distribution system and the entire cost of the operation of the work in the municipality.

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Q. Commissioner Chadwick testified that this \$65 per million gallons would be the retail price for selling this water to the inhabitants of the City of New York, retailing it to them?

A. I have not sufficient data to reconcile that to anything, or to interpret it, or to understand it.

Adjourned at 4:30 P. M., to convene March 21, 1911, at 11 A. M.

759

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UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT, NEW YORK COUNTY.

In the Matter

of

761

The Application and Petition of
JOHN A. BENSEL, CHARLES N.
CHADWICK and CHARLES A.
SHAW, constituting the Board
of Water Supply of the City of
New York, to acquire Real Es-
tate for and on behalf of the
City of New York, under Chap-
ter 724 of the Laws of 1905, and
the Acts amendatory thereof in
the Town of Hurley, County of
Ulster, New York, for the pur-
pose of providing an additional
supply of pure and wholesome
water for the use of the City
of New York.

Ashokan
Reservoir,
Section No. 15,
Parcel No. 733.

762

WILLIAM SAGE, JR.,
Claimant,

vs.

THE CITY OF NEW YORK,
Petitioner.

New York City, N. Y., Mch. 21, 1911.

The Commission convened at 11 A. M., pursuant
to adjournment, at Room 700, No. 47 Cedar Street.
New York City.

Present—Hon. GEORGE E. WELLER, Chairman.
 Hon. FRED H. PARKER,
 Hon. GEORGE W. BATTEN,
 Commissioners of Appraisal.

763

APPEARANCES

ARTHUR S. BARNES, Esq., for the Corporation Counsel of the City of New York.
 EDWARD A. ALEXANDER, Esq., for Claimant, Wm. Sage, Jr., *in re*, Parcel No. 733.

764

ROBERT E. HORTON, having been previously sworn, recalled, testifying as follows with regard to Parcel No. 733, Section 15:

Direct-examination—By Mr. Alexander:

Q. Mr. Horton, have you had any experience in acquiring reservoir sites?

A. Yes, some, especially negotiating for purchases.

Q. What is the usual method of procedure in the purchase of a reservoir site?

A. The best method, and the method that I know of, and that has been pursued by a company with which I am connected, has been to determine, in advance, as far as possible, the lands required and the character of the title. Then, if a large number of parcels were to be purchased, a man, several men, were sent on the ground, on the same day, with ready money, in abundance, to work in different parts of the reservoir site, and acquire, with blank forms of deeds, for cash outright, all of the reservoir site that could be purchased in one day.

765

Q. And then if they didn't succeed, would the price of the remaining land go up?

766 A. The experience in this particular case was that as soon as it became known that the lands were required for reservoir purposes, higher prices were asked and lands could not be purchased at the ordinary farm value.

Q. How high would they go up in comparison to farm values?

A. That would vary with the land, and with the owner, but in this instance, the prices asked were averaged perhaps two, three or five times the farm value.

Q. Was that paid?

A. In this instance it was paid.

767

Q. That is the usual method of procedure followed by all companies who purchase reservoir property?

A. Well, I would say that that was the best method known to me, and something similar to that method is usually followed.

Cross-examination—By Mr. Barnes:

Q. Was that in the State of New York?

A. It was.

Q. Where?

A. In connection with the purchase of lands for the Gray Reservoir, so called, in Herkimer County.

Q. Near Herkimer?

768

A. No, it is about twenty miles north of Herkimer, on the edge of the Adirondacks.

Q. Was this good farm land?

A. No, very poor farm land, nearly worthless for farming purposes.

Q. Any swamp land included?

A. Yes, some swamp land containing timber.

Q. Do you know the average price, per acre, of that land, not for reservoir purposes?

A. Not to exceed ten dollars per acre, without timber

Q. Was it that experience upon which you base your opinion of values on this land? 769

A. In the Ashokan Reservoir, not of the value.

Q. In arriving at your estimate of fifty-seven thousand—what is the exact figure?

A. Fifty-seven thousand eight hundred and thirty-six.

Q. You used two or three methods, didn't you?

A. I used two methods.

Q. And, just briefly, one of those was?

A. From my judgment, by comparing the average price stated to me to have been paid on awards, with the ratio of the average value of lands for agricultural purposes, to the value commonly paid for lands for reservoir purposes in connection with the purchase of the Gray Reservoir lands, and in general, elsewhere, as I had learned of such transactions. 770

Q. And the other method was what?

A. The other method was by estimating what price, in my opinion, a private enterprise could have paid for these lands and had developed the Esopus water supply therefrom, at a profit.

Q. And both of the results were practically the same as far as figures were concerned?

A. Yes.

Q. And after the same result, I believe you said, you took the value of three hundred and thirty dollars per acre as its value for farming purposes? 771

A. Not for the value of this particular parcel, I didn't attempt to determine the value of this particular parcel, and my method does not require it; I took three hundred and thirty dollars per acre as the average price paid for lands for agricultural and residential purposes throughout the Ashokan Reservoir.

Q. Now, Mr. Horton, your price of three hundred and thirty dollars per acre was then not your

772 estimate of the value of the land for farming purposes?

A. It was not.

Q. Then why did you assume that figure?

A. I made no estimate of this land for farming purposes.

Q. Didn't you testify that you got your six hundred and sixty dollars per acre by first taking the three hundred and thirty dollars an acre and doubling it?

A. It amounts to that substantially.

Q. And why did you take the three hundred and thirty dollars per acre?

773 A. I have already stated that.

Q. Because of the average award?

A. That was one reason. I also checked that by estimating the appropriate price included in the City's estimated cost of the Ashokan Reservoir lands, fifteen thousand acres at about three hundred and thirty dollars per acre. The estimate as given includes two other items which I took out.

Q. What were the items you took out?

A. The two taken out were relocation of railroads and relocation of highways.

Q. So that the amount you had left was approximately the value of the land included in the reservoir site?

774 A. Was approximately the value of the fifteen thousand acres taken in connection with the reservoir. It included the marginal lands also.

Q. And that amounted to approximately three hundred and thirty dollars per acre?

A. Yes, sir.

Q. And correspondingly the average awards?

A. Yes.

Q. In making this—you accepted that as the value for farming purposes?

A. No, I accepted that as the value of the lands

for any other use but reservoir uses, it might be for residential purposes also. 776

Q. You thought it fair to double that amount for reservoir purposes?

A. Yes.

Q. Do you know what amounts the other witnesses for claimant, on real property alone, have testified as the value of this property?

A. I do not.

Q. You don't know, as a matter of fact, that their estimates were approximately one hundred and forty dollars per acre?

A. No, I do not.

Q. Did you know that the average award on land within the reservoir site included elements of special value, for instance, water power? 776

A. I understand that it did. The figures I took did not include that; that was given as a separate item in the estimates.

Q. In reaching your conclusion of value you didn't take into consideration the value of this land for reservoir purposes, as testified to by the witnesses for the claimant on real property values?

A. I can answer that no; I didn't take that into account directly.

Redirect-examination—By Mr. Alexander:

Q. Did you know that the witnesses who appeared for the claimant testified to the value of this property, for farming purposes only? 777

A. I have not read the testimony. I talked about the matter with Mr. Burhans, but he didn't tell me the price he testified to, and I don't know that he told me that he testified for farming purposes only.

Q. Do you know there is a quarry on the property?

A. I know there is a small one on the property; I saw the ledge of rock, and it has been worked.

778 Q. Do you know that the highest value testified to by the witnesses who testified to the fair and reasonable farm value of the property was about one hundred and seventy-four dollars per acre, and not one hundred and forty dollars per acre, as stated by Mr. Barnes?

A. No, I do not know that.

Recross-examination—By Mr. Barnes:

Q. When did you examine this property with Mr. Burhans?

A. On the twenty-second day of February, 1911.

Q. Had you made a prior examination?

779 A. No, I had never been over the farm before; I had passed it.

Q. How many times since have you examined it?

A. Not any.

Q. Do you know Mr. Burhans was formerly the owner of this property?

A. I don't.

Q. How long were you on the property that day?

A. About two hours; went substantially over the entire property; where we could see every part of it.

Q. You are not a real estate expert, are you?

780 A. I don't consider myself a real estate expert in that locality; I have some knowledge in other localities.

Q. You are not testifying here as a real estate expert?

A. Not as a land or farm expert, no.

Q. Have you ever made any special investigation for the purpose of determining the value of this land for reservoir purposes, aside from the investigation in this instance?

A. No, no special investigation.

Q. You know Mr. Nostrand?

A. Yes.

Q. Do you know that for a time he was interested in the Ramapo Company? 781

A. Yes.

Q. Did you know at that time that he had previously investigated this very section for reservoir purposes; for determining its availability for reservoir purposes?

A. In a general way, I knew that.

Q. You didn't consult with him on the given value of this property for reservoir purposes?

A. I didn't; not at any time.

Redirect-examination—By Mr. Alexander:

Q. This twenty-nine million dollars referred to was the cost of construction of the dams and dikes necessary to build the completed reservoir on the Ashokan Reservoir site, was it not? 782

A. It was somewhat; it was the cost of construction; the estimated cost of construction, plus the land and water power damages, plus engineering supervision; it was all that.

Q. It also included relocation of highways and railroads?

A. Yes.

Q. That 29 million dollars had utterly, absolutely nothing to do with the value of the land alone?

A. The estimated value of the land was included in it, was one item. 783

Q. How many acres were taken, or constituted this Ashokan Reservoir site?

A. The City estimated on taking 15 thousand acres; the flowage will be about 10 thousand acres.

Q. And the other five thousand acres will constitute the margin of the reservoir, will it not?

A. Yes.

Q. Now, at the average price of six hundred and sixty dollars per acre, for the 15 thousand acres,

784 that would make nine million nine hundred thousand dollars for the entire reservoir site, assuming that you or anyone else acting on behalf of some private enterprise purchased this property at the rate of six hundred and sixty dollars per acre—

A. Yes.

Q. And that that price of nine million nine hundred thousand dollars would include the reservoir element of value in the property, as well as all other elements of value, would it not?

785 A. Yes, it would include the other elements in this way—if the property has several—has value for several different utilities, it obviously can only be sold for—on the basis of its value for some of those utilities; the reservoir utility being the highest utility of this property, its market value for that purpose would be greater than, and would cover over, or include, its market value for any other utility.

Q. Now, if the average awards are three hundred and thirty dollars per acre for this land, that amount added to the condemnation expenses would constitute about how much, in your judgment?

A. I don't think that I can answer that question offhand.

Q. You would have to look up the records?

786 A. I don't know what the condemnation expenses have been in acquiring this property.

Q. So that you have no definite idea now as to what this land, comprising these 15 thousand acres, will actually cost the City of New York to acquire?

A. I have not.

Q. Even paying its agricultural and residential value, as it has acquired most of that land, on that footing?

A. I do not know.

PETER ELBERT NOSTRAND, having been previously sworn, recalled, testifying as follows with regard to Parcel No. 733, Section 15:

787

Direct-examination—By Mr. Alexander:

Q. Have you examined Parcel No. 733 with the object in view of estimating its fair and reasonable market value, taking into consideration all elements of value in the property?

A. I have.

Q. What, in your opinion, is the fair and reasonable market value of this parcel?

A. Fifty-eight thousand seven hundred and twenty-six dollars.

Q. And how have you arrived at that market value?

788

A. I have accepted a statement made before this Commission by Commissioner Chadwick, that the profits of an enterprise of this character would amount to 11 million dollars per year—

Q. You mean gross profits or net profits?

A. Net profits. (Continued.) Would amount to 11 million dollars per year on an enterprise of this kind, based on the furnishing of 500 million gallons per day; I have accepted as a basis of an estimation the figures as testified before this Commission by the Chief Engineer of the City, Mr. Smith, who placed an estimate of 162 million dollars, including 10 million dollars for distribution. I have on the basis of this estimation figured the cost at which water would have to be sold to make a net profit of 11 million dollars per year, and I found that the price—the selling price would amount to about one hundred and ten dollars per million gallons—

789

Q. Is that retail to the inhabitants of the City?

A. Retail or in wholesale at that price.

Q. Do you mean that that—that the water would have to be sold at one hundred and ten dollars at

790 the City Line, or delivered to inhabitants who live in other parts of the City?

A. It would include the cost of delivery; part of the delivery cost was estimated in the original estimate, and the distribution cost is included in the estimation of expenses.

Q. I didn't ask you that, Mr. Nostrand, whether the distribution cost is included. What I am driving at is this—whether, in order to make this profit of from 10 to 11 million dollars per year, the water would have to be sold at one hundred and ten dollars per one million gallons, delivered to the inhabitants of the City or to the customers of it?

791 A. Yes. (Continuing.) I have also accepted the estimate of Mr. Smith as to the original estimated cost of the Ashokan Reservoir and its accessories, amounting to 29 million dollars. I have also accepted his estimate of the actual cost of construction, amounting to 14 million dollars—

Commissioner Parker: Construction of what?

The Witness: Of the reservoirs, dams and necessary walls, and other work in connection with the reservoir construction.

Chairman: Meaning the reservoir in its entirety?

792 The Witness: That the contract price amounted to 14 million dollars.

A. (Continuing.) Deducting this 14 million dollars from the 29 million dollars, we have a cost of land and other expenses, amounting to 15 million dollars, which I have divided into two portions, one portion, amounting to 9 million dollars, representing the cost of the removal of the railroad, or riparian damages, highways, and other expenses, and an amount of 6 million dollars, as representing the amount originally apportioned in the estimate for

the payment of land, or an amount which I apportioned for that purpose, the two amounts totaling 15 million dollars. I have assumed that the Ashokan Reservoir in relation to these profits would be entitled to at least a percentage of profit which would accrue to the expenditure of 29 million dollars as against the total expenditure of 162 million dollars; I have figured that $29/162$ nds of 11 million dollars is equal to one million nine hundred and sixty-nine thousand one hundred and thirty-five dollars (\$1,969,135). If, from this amount of one million nine hundred and sixty-nine thousand one hundred and thirty-five dollars we deduct an amount of four per cent. which would represent profit to an investor for an investment of 29 million dollars, we get a sum of one million one hundred and sixty thousand one hundred dollars (\$1,160,100; this amount deducted, leaves a balance of eight hundred and nine thousand one hundred and thirty-five (\$809,135) dollars; this amount has a surplus profit above the investment profit of four per cent., and in my opinion should be divided between the original cost of the land the structures; that is, in proportion to the total investment, the additional profit, due to the cost of structures, going to the investor, and the extra profit on the land going to the original owners who were forced by the investor to sell their land to them. As an instance, if the reservoir were built by the City the extra profit on the structures would go to the City, and the extra profit on the land would go to the landlord, in proportion to the total amounts of investment. This eight hundred and nine thousand one hundred and thirty-five dollars (\$809,135), if capitalized at four per cent., equals four million one hundred and eighty-five thousand one hundred and seventy-five dollars (\$4,185,175), which amount, added to the original estimated cost of 6 million dollars, makes a total

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796 of ten million one hundred and eighty-five thousand one hundred and seventy-five dollars (\$10,185,175), as the value of the land for reservoir purposes on the site; there being 15 thousand acres of land on this site, this amount divided by 15 thousand equals six hundred and seventy-nine dollars, the value per acre of the land on the site. Parcel No. 733, containing 86.489 acres, multiplied by six hundred and seventy-nine dollars per acre, makes the value of Parcel No. 733, fifty-eight thousand seven hundred and twenty-six dollars (\$58,726).

797 Q. In other words, that is the basis of the theory that the City of New York is saving the large amount of money on by using this site in preference to any other site?

A. Yes.

Q. By saving this money it makes the entire profit as a business enterprise?

A. Yes.

Q. And a part of these profits is contributory to this reservoir site which forms the basis of the entire enterprise?

A. Yes.

Q. In this business enterprise it is necessary to have this reservoir site?

A. Yes.

798 Q. It is also necessary to have the necessary labor and materials to build a reservoir and the aqueducts and other appurtenances?

A. Yes.

Q. We know the actual cost of the labor and materials that go into the construction work?

A. Yes.

Q. And we know, according to Commissioner Chadwick, what the net profits per annum will be?

A. Yes.

Q. And you have simply figured up the proportionate part that should fairly be attributed to this land?

A. I have.

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Q. Which is the basis of the whole enterprise, is it not?

A. Yes.

Q. Without which the enterprise could not go on?

A. No.

Q. The demand for water of this site exists not only on the part of the City of New York, but on the part of other municipalities?

A. It does.

Q. This water could be profitably sold to these various other municipalities, could it not?

A. Yes.

Q. That would include all of the municipalities in the Valley of the Hudson? 800

A. Yes.

Q. And in Jersey City?

Q. Albany, Troy and Schenectady and other places north, as well as south of Kingston?

A. Yes.

Q. Within a limit of one hundred miles?

A. Yes.

Q. In Newburgh?

A. Yes.

Q. Newburgh is badly in need of additional water, is it not?

A. I have heard that it was.

801

Cross-examination—By Mr. Barnes:

Q. Mr. Nostrand, you are a civil engineer?

A. Yes.

Q. Some years ago you were connected with the Ramapo Water Company?

A. Yes, sir.

Q. You have made a special study of reservoir sites, have you?

A. I have.

Q. And in this particular locality?

802

A. Yes.

Q. Did you actually purchase property in this locality for a proposed reservoir site?

A. I did, on the site of the Ashokan Reservoir.

Q. Have you examined any parcel other than No. 733 for the purpose of determining its value for reservoir purposes?

A. Yes.

Q. Can you recall any such parcels?

A. Not by number.

Q. Do you know where Section 6 in this proceeding is?

A. Yes.

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Q. Did you examine the parcels included in that section?

A. I believe I did, yes.

Q. And for the purpose of determining its value for reservoir purposes?

A. For the purpose of determining its market value.

Q. That is, taking into consideration the fact that it was to be used for reservoir purposes?

A. Yes.

Q. Did you testify upon any such parcels?

A. I believe so.

Q. Do you recall Parcel No. 239A?

A. I recall that number.

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Q. Recall whether you testified on that parcel?

A. I don't recall the actual number or figures, but I have some memory of that number.

Q. Is Parcel No. 264 in that section?

A. I believe so.

Q. Do you recall whether you testified on that parcel as to its value for reservoir purposes?

A. For all purposes.

Q. And that included its use as a reservoir site?

A. Yes, sir.

Q. This amount you testified to to-day as affect-

ing Parcel No. 733, is that your opinion of its fair market value at the time the City took title? 805

A. It is taking into consideration all the elements in connection with the property.

Q. That is, its availability and adaptability for reservoir purposes?

A. Yes, in connection with the knowledge that I now have on that subject.

Q. And in connection with the value of the rest of the land going to make up the reservoir site?

A. Yes.

Q. You were aware of the fact that there were a number of different owners included in that reservoir site prior to the time the City took it?

A. Yes.

Q. Can you state, approximately, as to the number of parcels upon which you have testified as to value, including their value as a part of the reservoir site?

A. No, I cannot; there are a good many.

Q. Recall whether you testified on three or four parcels?

A. More than that.

Q. On ten?

A. More than that.

Q. Twenty?

A. I guess so.

Q. In any case, have you testified that they had a special value by reason of their adaptability and availability for a reservoir site? 807

A. I have not.

Q. As a matter of fact, you have testified that you didn't think that land had an increased value for reservoir purposes in these several proceedings, have you, Mr. Nostrand?

A. I don't know that I would be as broad as that.

Q. I might refresh your memory. In Parcel No. 239A, Mr. Nostrand, I show you your testimony at

808 folio 11778, and ask you if, in that proceeding, you didn't testify: "Q. In your opinion, Mr. Nostrand, is the market value of property increased by reason of the fact that it is one parcel of a number of parcels going to make up a reservoir site? A. It is not."

A. That was my opinion then.

Q. Parcel No. 264A—

A. (Interrupting.) Excuse me, was my evidence read in on this parcel, or was it actual evidence?

Q. It does not show; that was the reason of the question. Unless your evidence was so read in, you so testified?

809 A. Yes.

Q. As a matter of fact, that was your opinion at that time?

A. Yes.

Q. With reference to Parcel No. 264, do you recall giving the same testimony, approximately?

A. I believe so, yes.

Q. In each of the parcels where you have testified upon this question of reservoir adaptability, prior to the present hearing, you have so testified?

A. I am not so sure about that, but I have in a number of parcels.

810 Q. Can you recall any instance other than this particular instance, where you have testified to an additional value by reason of its availability for a reservoir site?

A. No, sir.

Q. You have testified to a number of purchases that you made as agent for the Ramapo Company?

A. Yes.

Q. Do you recall the Van Steenburg property in the Town of Olive?

A. Yes.

Q. Were there any buildings on that when you purchased it for the Ramapo Company? 811

A. Let me see the list, will you (referring to list)? I believe there were.

Q. Can you recall what they were?

A. No.

Q. Have you any memoranda from which you could refresh your memory as to the details of the several properties that you have testified to as having bought?

A. I have some memoranda on some of them, but it isn't here. I can get it.

Q. As a matter of fact some of the property was improved?

A. Yes. 812

Q. There were houses, barns and necessary out-buildings for farms?

A. Yes.

Took recess, 12.15, to be resumed 2 o'clock, Mr. Nostrand to consult his memoranda for the purpose of further testifying as to the properties bought by him for the Ramapo Company.

814

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT—NEW YORK COUNTY.

In the Matter

of

The Application and Petition of
 JOHN A. BENSEL, CHARLES N.
 CHADWICK and CHARLES A.
 SHAW, constituting the Board
 of Water Supply of the City
 of New York, to acquire real
 estate for and on behalf of the
 City of New York, under Chap-
 ter 724 of the Laws of 1905,
 and the Acts amendatory
 thereof, in the Town of Hur-
 ley, County of Ulster, New
 York, for the purpose of pro-
 viding an additional supply of
 pure and wholesome water for
 the use of the City of New
 York.

815

Ashokan
 Reservoir,
 Section No. 15,
 Parcel No. 733.

816

WILLIAM SAGE, JR.,
 Claimant,
 vs.

THE CITY OF NEW YORK,
 Petitioner.

New York City, N. Y., March 21, 1911.

The Commissoin convened at 2 p. m., pursuant to
 adjournment, at Room 700 No. 47 Cedar Street,
 New York City.

Present—Hon. GEORGE E. WELLER, Chairman;
 Hon. FRED H. PARKER,
 Hon. GEORGE W. BATTEN,
 Commissioners of Appraisal.

817

APPEARANCES:

ARTHUR S. BARNES, Esq., for the Corporation Counsel of the City of New York.
 EDWARD A. ALEXANDER, Esq., for claimant, Wm. Sage, Jr., *In re*. Parcel No. 733.

Cross-examination (continued)—By Mr. Barnes:

818

Q. Mr. Nostrand, with reference to the properties that you bought while representing the Ramapo Company, I will ask you to state in each instance as to whether the property was improved or unimproved property?

(A. (Reading from record.) Benjamin Van Steenburgh, Town of Olive, Ulster County, March 28th, 1899, 10 acres, \$3,000; improved.

Jesse V. Boice, Olive Bridge, Ulster County, March 31, 1899, four acres, five acres, \$13,600; improved.

Howard Barton, Olive Bridge, Ulster County, March 29th, 1899, four acres, \$1,000; improved.

Isaac L. Merrihew, Olive Bridge, Ulster County, March 29th, 1899, forty acres, \$10,000; improved.

William Haver and Elizabeth Haver, Olive Bridge, Ulster County, March 30th, 1899, two acres, \$4,000; improved.

Ephraim M. Bishop, Olive Bridge, Ulster County, March 29th, 1899, five acres, \$1,800; improved.

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Commissioner Parker: Where was this property, what section?

The Witness: This was mostly around the

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broad bridge; right just above the present high dam. Some of it is of another section. If you like when I get to that I will note it.
Commissioner Parker: No, never mind.

Jacob W. Beesmer, Olive Bridge, Ulster County, March 30th, 1899, six acres, \$3,000; improved.

Hugh Locke, Olive Bridge, Ulster County, March 30th, 1899, 22 acres, \$6,000; improved.

Herman Barton, Jr., Olive Bridge, Ulster County, March 29th, 1899, five acres, \$2,000; improved.

Asa Bishop, Olive Bridge, Ulster County, March 29th, 1899, one acre, \$1,000; improved.

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Charles C. Winne and Elizabeth E. Winne, Olive Bridge, Ulster County, March 30th, 1899, one-quarter acre, \$2,000; improved.

Emma Winchell, Cold Brook, Ulster County, March 31st, 1899, two acres, \$1,200; improved.

Elizabeth A. Winne, Cold Brook, Ulster County, March 31st, 1899, 60 acres, \$5,000; improved.

Davis Mains, Cold Brook, Ulster County, March 31st, 1899, 14 acres, \$1,400; improved.

David Winne, Cold Brook, Ulster County, March 31st, 1899, 900 acres, \$6,000; unimproved.

William C. Winne, Cold Brook, Ulster County, March 31st, 1899, 15 acres, \$3,500; improved.

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Charles C. Krom, Shokan, Ulster County, March 31st, 1899, 100 acres, \$6,000; improved.

William D. Every, Shokan, Ulster County, March 30th, 1899, 15 acres \$1,000; not improved.

Mr. Alexander: How many acres?

The Witness: Fifteen.

Henry Boice, Shokan, Ulster County, March 31st, 1899, 75 acres, \$3,000; improved.

Mary L. Cole, Shokan, Ulster County, March 30th, 1899, 112 acres, \$4,500; improved.

Richard Donohue, Shandaken, Ulster County, 823
April 1st, 1899, 363 acres, \$11,000; improved.

Gilbert Bechworth, Shandaken, Ulster County,
April 1st, 1899, 75 acres, \$1,500; unimproved.

Ira Elmendorf, Town of Olive, Ulster County,
April 3rd, 1899, $1\frac{1}{4}$ acres, \$5,000; improved.

Constantine Bloom, Town of Olive, Ulster
County, April 3rd, 1899, one acre, \$1,500; improved.

D. N. Matthews, Town of Olive, Ulster County,
March 31st, 1899, eight acres, \$1,600; improved.

Jacob A. Delameter, Town of Olive, Ulster Coun-
ty, April 1st, 1899, five acres, \$3,500; improved.

John E. Nicholls, Town of Olive, Ulster County,
April 1st, 1899, one acre, \$1,900; improved.

V. R. Merrihew, Brodhead Bridge, Ulster County,
April 3rd, 1899, one-quarter acre, \$1,000; improved.

Frances Eckert, Town of Olive, Ulster County,
April 7th, 1899, 250 acres, \$2,500; unimproved.

Aaron Every, Town of Olive, Ulster County,
April 7th, 1899, 150 acres, \$1,500; unimproved.

Jacob Eckert, Town of Olive, Ulster County,
April 7th, 1899, 20 acres, \$800; improved.

Rebecca N. Eckert, Town of Olive, Ulster County,
April 7th, 1899, 60 acres, \$600; unimproved.

Jacob Eckert, Town of Olive, Ulster County,
April 7th, 1899, 150 acres, \$250; unimproved.

Jacob Eckert, Town of Olive, Ulster County,
April 7th, 1899, 50 acres, \$500; unimproved.

Eugene B. Kerr, Town of Olive, Ulster County,
April 7th, 1899, 64 acres, \$1,200; improved.

Nathan Eckert, Town of Olive, Ulster County,
April 7th, 1899, two acres, \$700; improved.

Daniel Every, Town of Olive, Ulster County,
April 10th, 1899, 61 acres, \$4,000; improved.

Garrison Davis, Town of Olive, Ulster County.
April 7th, 1899, 110 acres, \$3,000; improved.

John Marlin Eckert, Town of Olive, Ulster

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826 County, April 7th, 1899, $17\frac{1}{2}$ acres, \$500; improved.

Isaac Short, Woodstock, 430 acres, \$3,000; unimproved.

William Short, Woodstock, Ulster County, April 6th, 1899, 435 acres, \$5,000; unimproved.

Frederick Happy, Woodstock, Ulster County, April 6th, 1899, 1,000 acres, \$8,000; unimproved.

Oliver Davis, Shokan, Ulster County, April 4th, 1899, three acres, \$1,200; improved.

Daniel Coons, Bushnellville, Greene County, April 8th, 1899, 60 acres, \$1,500; improved.

827 Anna E. Schillat, Lake Hill, Greene County, April 7th, 1899, 63 acres, \$500; unimproved.

Albert G. Loomis, Deposit, Greene County, November 26th, 1898, five acres, \$100; unimproved.

William B. Davis, Town of Olive, Ulster County, December 3rd, 1898, five acres, \$700; improved.

Cyrus Montaney, Esperance, Schoharie County, November 1st, 1898, 38 acres, \$800; improved.

Emery Van Wagner, Woodstock, Ulster County, March 11th, 1899, 60 acres, \$300; unimproved.

J. H. Simpson, Shandaken, Ulster County, December 14th, 1898, five acres, \$500; unimproved.

R. S. Wey, C. C. Wey and Mary W. Wey, Shandaken, Ulster County, November 2nd, 1898, — acres, \$400; unimproved.

828 Mary A. Flynn, Shandaken, Ulster County, October 26th, 1898, 281 acres, \$4,000; improved.

John R. Evans, Shandaken, Ulster County, December 5th, 1898, five acres, \$500; unimproved.

Frances A. Brinnier, Shandaken, Ulster County, October 24th, 1898, 10 acres, \$500; unimproved.

Cornelia A. Bishop, Town of Olive, Ulster County, October 14th, 1898, seven acres, \$2,500; improved.

Joseph S. Hill, Town of Olive, Ulster County, October 22nd, 1898, 30 acres, \$2,500; improved

William V. N. Boice, Town of Olive, Ulster County, December 3rd, 1898, 25 acres, \$1,600; improved. 829

Libby Burton, Town of Olive, Ulster County, March 24th, 1899, 45 acres, \$1,000; improved.

Darius W. Hover, Town of Olive, Ulster County, March 24th, 1899, 86 acres, \$8,000; improved.

Herman W. Barton, Town of Olive, Ulster County, March 24th, 1899, 30 acres, \$3,000; improved.

Henry Snyder, Town of Olive, Ulster County, March 24th, 1899, 110 acres, \$5,000; part of this, three tracts; one improved.

John Every, Town of Olive, Ulster County, March 24th, 1899, 100 acres, \$4,000; improved. 830

John Raney, Town of Olive, Ulster County, March 24th, 1899, 50 acres, \$4,000; improved.

John I. Boice, Town of Olive, Ulster County, March 24th, 1899, 55 acres, \$4,200; improved.

Zachariah Palen, Town of Olive, Ulster County, March 24th, 1899, 121 acres, \$4,000; improved.

Josiah H. Hasbrouck, Cold Brook, Ulster County, March 25th, 1899, 64 acres, \$3,000; improved.

Hannah Hubbard, Cold Brook, Ulster County, March 25th, 1899, 150 acres, \$3,000; improved.

Jerome Winne, Cold Brook, Ulster County, March 25th, 1899, 185 acres, \$1,000; unimproved.

Josiah L. Hasbrouck, Cold Brook, Ulster County, March 25th, 1899, 4½ acres, \$2,000; improved. 831

Millard H. Davis, Boiceville, Ulster County, March 25th, 1899, 50 acres, \$250; unimproved.

Millard H. Davis, Boiceville, Ulster County, March 25th, 1899, 110 acres, \$5,000; improved.

Z. P. Boice, Shokan, Ulster County, March 25th, 1899, 220 acres, \$400; unimproved.

Z. P. Boice, Shokan, Ulster County, March 25th, 1899, 175 acres, \$350; unimproved.

Mary A. Weeks, Town of Olive, Ulster County, April 11, 1899, 21 acres, \$2,500; improved.

832 Mary A. Short, Verona, Oneida County, April 10th, 1899, 56 acres, \$1,200; unimproved.

George Silkworth, Town of Olive, Ulster County, April 14th, 1899, 56½ acres, \$6,000; improved.

Elias D. Eighmey, Woodstock, Ulster County, April 13th, 1899, 76 acres, \$4,000; improved.

John H. Martin, Woodstock, Ulster County, April 13th, 1899, 80 acres, \$3,000; improved.

Mahala Waters, Woodstock, Ulster County, April 13th, 1899, 140 acres, \$6,500; improved.

Frank R. Martin, Woodstock, Ulster County, April 13th, 1899, five acres, \$5,000; improved.

833 Emory Van Wagner, Woodstock, Ulster County, April 13th, 1899, 32 acres, \$1,200; improved.

John Duncan, Cairo, Greene County, February 27th, 1899, 125 acres, \$5,000; improved.

Q. Now, Mr. Nostrand, in some instances you renewed the options which covered those properties, didn't you?

A. Yes.

Q. When you wanted to renew the options, did you find that they refused to renew without an increase in price?

A. Some did; some didn't.

Q. Was that so in more than one or two instances?

834 A. Yes, in looking over the contracts recently, I can—I find that there are several instances, probably four or five; I can pick them out of that list, that were renewed at an advance.

Q. Now, you testified in proceedings of this character, from about the middle of 1907, did you not, until the 1st of January, 1910?

A. I think I was first engaged by the City of New York, and testified, sometime in November, 1907, and I then testified from November, maybe October, from the latter part; I testified some in November and December, then I didn't testify again until

sometime the following year, in June, as I remember it to-day, and from that time on I was doing more or less work for the City for about another year—let me see, that was 1908, 1909, 1910—for about one year and a half.

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Q. During that period of time you testified in a number of cases on behalf of the City of New York?

A. Yes.

Q. And in a number of those cases, did the question of the value of the land for reservoir purposes—was the question of the value of the land for reservoir purposes before the Commission?

A. Yes.

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Q. And in—do you recall a single instance where you had testified before the Commission, that it had an added value by reason of its adaptability or availability for reservoir purposes?

A. No.

Q. And your employment with the City of New York continued up to about the 1st of January, 1910?

A. A little later than that.

Q. About what time, can you state?

A. I think somewhere up till April or May, with intermissions of some length of time. The last case I testified on was in April or May.

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Q. Do you know of the sale of the land embraced in Parcel No. 7, in Section 1, to the owner at the time the City acquired title?

A. Now, whose parcel is 7?

Q. Charles Buck?

A. No, I do not.

Q. You testified on that parcel before the Commission, did you not, Mr. Nostrand?

A. No, I don't think so.

Q. Not on Parcel No. 7?

A. I don't think that is the correct number.

838 Q. Yes, Parcel 7, Section 1.

A. If that is the correct number I testified on that.

Q. Do you recall the location of the land embraced in Parcel No. 239A, Mr. Nostrand, approximately?

A. What was the name of the owner?

Q. You recall the location of land in Section 6 in this proceeding?

A. Yes.

Q. Approximately, 239A is within that section?

A. Yes.

Q. Also Parcel No. 264?

839 A. I think they were.

Q. Do you consider that the land embraced in Parcel No. 733 is any more suitable or available for reservoir purposes, than the land embraced in 239A, or 264?

A. No, I cannot say that it is.

Q. In both of these cases you testified that you didn't think it had an additional value by reason of its adaptability or availability for reservoir purposes?

A. (Let me look at my testimony—referring to testimony.) I don't think I would put it that way; I said that I didn't put any additional value for its use for reservoir purposes, in connection with Parcel No. 239; I don't see anything regarding No. 264.

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Q. With reference to the question as to whether 264—you testified Mr. Nostrand, I show you the minutes of your testimony on that case to refresh your memory—can you answer, after having so refreshed your memory?

A. This part that you have marked is not an answer to the question you have asked me at all.

Q. I ask the same question with reference to Parcel No. 264, and ask you to refresh your memory

from minutes taken before the Commission, at folio 11984 of the printed record? 841

A. I can only answer that my answer to that question had no reference at all to the question that you just asked me.

Q. In reference to Parcel No. 264, did you testify —“Q. In your opinion, Mr. Nostrand, is the market value of property increased by reason of the fact that it is one parcel of a number of parcels going to make up a reservoir site?” “A. It is not?” You so testified?

A. I so testified.

Q. Can you state, approximately, Mr. Nostrand, in how many cases you testified where the question of value of the lands for reservoir purposes was before the Commission? 842

A. In quite a number of cases, but I couldn't give you the number, but there were several.

Redirect-examination—By Mr. Alexander:

Q. Mr. Nostrand, in all those cases where the question of reservoir availability and adaptability came before the Commission, you testified as a witness for the City of New York, did you not?

A. I did.

Q. Who retained you?

A. I was retained by Senator Linson, or the Corporation Counsel. 843

Q. Senator John J. Linson, acting as counsel for the City of New York in those proceedings?

A. Yes, through him by his assistants and successors.

Q. Was not the testimony that you gave there, based on certain assumptions, applied to the particular parcels of land in question?

A. Yes.

Q. Who gave you the basis for those assumptions?

A. Senator Linson.

844 Q. What did Senator Linson tell you to assume in that respect?

A. That the cases indicated that where the property was one of a number of pieces of property that would enter into a reservoir site, that the Courts had decided that it had no especial value on that account; that where a piece of property composed the land of a reservoir site, there the Courts had, in some cases, decided that it had some special value.

Q. Did you accept his statement of the law as correct?

A. Yes.

845 Q. Did you base your testimony on his assumption of the law?

A. I did.

Q. In every instance where you testified on behalf of the City?

A. Yes.

Q. Did you feel that you were testifying accurately at the time, so far as the dictates of your own judgment were concerned?

A. I didn't consider so much that it was a question of judgment; I thought it was a question of fact.

846 Q. Did you consider in giving the testimony, that you did under Senator Linson's assumption, that you were testifying with fairness to the property owners?

A. I hardly thought it was entirely fair to the property owners, excepting that it was a question of conditions.

Q. A question of what he told you the law was?

A. Yes.

Q. That is all your testimony amounted to on those cases?

A. Yes.

Q. After Senator Linson was superseded by Mr.

William McMurtrie Speer, were you retained by the City? 847

A. In one case.

Q. Since that time have you had some dispute with the City with regard to collecting your fees as a witness?

A. I had some argument and talk with Mr. Speer in connection with the settlement of my bill, then due, and it was finally settled by the City at a reduction of about one thousand dollars, although my contract was a written contract at so much per day.

Q. With whom did you carry on those negotiations?

A. Mr. Speer.

Q. He beat you out of one thousand dollars? 848

A. He reduced my bill to that extent.

Q. And Mr. Barnes is one of those representing the City, one of the appointees of Mr. Speer?

Chairman: If you know.

Mr. Alexander: If you know.

A. I know that he is, because I have had something to do with Mr. Barnes in one of these cases.

Q. Did Mr. Speer ever ask you to appear as a witness on reservoir values for the City of New York?

A. No.

Q. Mr. Barnes? 849

A. No.

Q. In any of the testimony that you gave—

A. (Interrupting.) I would like to state that since the time that I ceased to do work for the City, that Mr. Speer, through his representatives, caused to be placed in the records, a number of appearances, at least a number of statements, as to my values on various properties, having read into the record sworn testimony.

Q. Now, you testified concerning the fair and

850 reasonable market value of various properties forming parts of this reservoir site, as a witness on behalf of the City, did you not?

A. I did.

Q. Did you, in any of those values, take into consideration the reservoir element of value?

A. I took into consideration the fact that they were part of a reservoir, and only to that extent.

Q. Did you take into consideration this reservoir element of value?

A. I did not.

851 Q. Simply testified to the fair and reasonable market value of these properties as farms, or for other purposes for which they were being used at that time, exclusive of any added value for reservoir availability and adaptability, isn't that right?

A. Correct.

Q. Did you follow the awards the various Commissions made in those cases in which you testified?

A. Not at all.

Q. In a great many?

A. No.

Q. Do you know whether the Commissioners ever awarded less than the values which you gave, in a single instance?

A. No, not that I know of.

852 Q. So that, in all those cases where you testified for the City of New York, your estimate, so far as Commissions are concerned, was considered to be entirely too low?

A. Yes.

Q. But I presume you know that in this particular hearing, the same City of New York now questions the weight to be given to your testimony, you know that, don't you?

A. It would appear so.

Q. With respect to these various lands, some of which you have testified are improved, and some

unimproved, you didn't state the character and kinds of improvement that were on the land, did you? 853

A. No.

Q. In purchasing these lands which you describe in the most general terms as improved and unimproved, did you try to get them as cheaply as you could for the Ramapo Company?

A. I did.

Q. And buy them as farm or residential land as the case might be?

A. I did.

Q. Didn't pay any extra added value, did you?

A. No. 854

Q. Tried to get them as cheap as you could?

A. I did.

Q. Tried to save as much money as you could for the Ramapo Company?

A. Yes.

Q. As a matter of fact, these prices were very cheap, were they not?

A. Yes.

Recross-examination—By Mr. Barnes:

Q. You stated that since your connection with the City had ceased, sworn testimony of yours had been read in the record?

A. Yes. 855

Q. Do you know what case it was read in, Mr. Nostrand?

A. I don't know now, but I did know some time ago.

Q. Do you recall whether the question of reservoir adaptability was before the Commission in that particular case?

A. I think it was.

Q. In the two cases which you have refreshed your memory on, 239-A and 264, in those two cases,

856 you considered the value of the land for all of the purposes for which it could be used?

A. Yes.

Q. And your testimony was based upon that conclusion of fact?

A. Yes.

Q. You cannot recall now the cases where your testimony was read in?

A. I think there were some cases before Commission 15 and Commission 17.

Q. In your testimony given in this instance as to value, your conclusion of value was based upon certain assumptions?

857 A. Yes.

Q. Who gave you those assumptions?

A. In which case is this?

Q. This particular case?

A. Those assumptions were taken from the testimony on record in this proceeding.

Q. In that you used a certain selling price for the water, did you not?

A. Yes.

Q. And that price was how much?

A. One hundred and ten dollars.

Q. In your testimony, given on 239A and 264, you made certain computations, did you not?

858 A. Yes.

Q. You used a certain selling price in those cases?

A. Yes.

Q. What was the selling price there?

A. Seventy dollars.

Re-redirect-examination—By Mr. Alexander:

Q. When you testified on Parcels 239A and 264, you didn't know as much about this subject as you do now, did you?

A. No.

Q. Commissioner Chadwick, of the Board of Water Supply, has enlightened you a great deal, has he not? 859

A. Considerably.

Q. You never thought there was the amount of net profit in this business that he has sworn exists?

A. Oh, yes.

Q. In what respect has he enlightened you, then?

A. He has made a definite statement that there was that much profit in the business.

Q. You testified on those parcels that the water would sell at seventy dollars per one million gallons?

A. No, I did not. 860

Q. Then I misunderstood your testimony now.

A. I testified that if the water was sold at seventy dollars per one million gallons certain results would follow.

Q. Then your testimony was based on the assumption that the water would be sold for seventy-dollars per one million gallons?

A. Yes, not only that, my testimony was based not only upon that, but upon the assumptions of cost and revenue which were presented by Mr. Barney, the engineer of the claimant.

Q. Now, that you know, according to the testimony given by Commissioner Chadwick, that the City will make a net annual profit of from ten to eleven million dollars, you have figured out from that, that in order to make that net annual profit, the water should be sold at one hundred and ten dollars per one million gallons? 861

A. Yes, in that neighborhood.

Q. When you gave your testimony before, on Parcels 239A and 264, based upon the assumption that the City would sell the water at seventy dollars per one million gallons, would the City make

862 a net annual profit of from ten to eleven million dollars, by selling water for seventy dollars per one million gallons?

A. I doubt it.

Q. Then Commissioner Chadwick's testimony has indicated to you, has it not, that the City intends to make more profit than you thought the City would make when you testified on Parcels 239A and 264?

A. Yes.

Q. I understood you to say that you had not been enlightened in that case before?

A. That is a case of correction of enlightenment.

863

Q. You testified in answer to one of Mr. Barnes' questions that when you gave testimony of the fair and reasonable market value of Parcel No. 239A, you took into consideration all the elements of value?

A. Yes.

Q. Did you take into consideration any added value by reason of that parcel being part of an actual reservoir site?

A. No.

Q. Then you didn't take into consideration all of the added elements of value?

A. Yes, as I understood it at that time, not as I understand it now.

864

Q. The reason you placed those values on the property was that, throughout your entire testimony on those parcels you had assumed that there was no added value on account of reservoir availability and adaptability on account of what Senator Linson told you that the courts held?

A. Yes.

Q. Under such circumstances?

A. Yes.

Q. That is correct, is it not?

A. Yes.

Q. And that was the one fact upon which you based your entire testimony? 865

A. Yes.

Q. The sole fact?

A. Yes.

Q. And the City, outside of the thousand dollars that Mr. Speer lopped off, afterwards paid you regularly for the testimony you gave?

A. No, they had a dispute previous to that; after I had worked with them two or three months, and they had agreed to pay their price, hard times came on and they didn't want to pay that price; I entered into argument about that, and my bills were cut down then, and then a written agreement was made whereby the City was to pay me a certain rate per day and I was to do the work on the order of the Corporation Counsel's representative, and the payments were to be made monthly. 866

Q. Who made the verbal agreement with you?

A. The verbal agreement was made with Senator Linson; the written agreement with the Corporation Counsel, through Mr. Sterling, then acting as Corporation Counsel.

Q. Did Senator Linson go back on the verbal agreement, or someone else?

A. Well, I rather think he did; at any rate, the first agreement was made on the basis of seventy-five dollars per day and expenses—no, one hundred dollars per day and expenses—and the settlement of that bill was made at the rate of seventy-five dollars per day and expenses. 867

Q. That was at the time the City was flush?

A. The times were good when the agreement was made, hard times came on afterward and that agreement, that amount of money was paid provided I would agree to work for the City on the basis of fifty dollars per day and expenses.

Q. When did you first hear about the courts of

868 New York State having held that no added value should be given for reservoir availability and adaptability?

A. When talking with Senator Linson.

Q. That was the first time you ever heard of it?

A. Yes.

Q. Did he tell you that it was the settled law?

A. Yes.

Q. That was immediately prior to the time that you were put on the stand as a witness?

A. Sometime before that time, after my engagement.

Q. You relied on his statement of the law as a fact?

869

A. Certainly.

Q. Assuming it to be a fact?

A. I did.

Q. That is the reason why you testified there was no added value?

A. Yes.

Re-recross-examination—By Mr. Barnes:

Q. You have been an engineer how long, Mr. Nosstrand?

A. I graduated in 1875.

Q. What portion of the time since you graduated have you given to the question of reservoir—to the investigating of reservoir sites or proposed reservoir sites?

870

A. Since 1885, practically the most of the time; that is, more or less of the time.

Q. The testimony that you gave in the two years prior to your severing connection with the City, was based upon your experience as an engineer, was it not?

A. No; some of it was, some was not.

Q. Was your conclusion as to value in those cases based upon your experience as an engineer?

A. In some cases.

871

Q. In this case, is it based on your experience as an engineer?

A. I should say yes.

Q. And the cases that you testified to before the Commissions, prior to severing connection with the City, where the like question was in the proceeding, was your testimony there based on your experience as an engineer?

A. Not so much as on my experience as a buyer of property for the purpose of reservoir use.

Q. Your testimony in this case is based upon your experience as an engineer, as opposed to the basis for your testimony in prior cases?

872

A. No.

Q. Well, you stated that your testimony in the prior cases was based more upon your experience of buying and selling reservoir properties?

A. The buying and selling of property in that particular locality.

Q. Do you mean in the locality of the Ashokan Reservoir?

A. Yes.

Q. You say that was the basis of your testimony in the prior cases?

A. On some of them, yes.

Q. And you say that your testimony in this case has been based upon certain statements, conclusions, attested to by Commissioner Chadwick?

873

A. Yes, and certain statements made by the Chief Engineer, Mr. Smith.

Q. I believe Mr. Smith testified as to certain figures of cost?

A. Yes.

Q. And Commissioner Chadwick's figures were figures of income?

A. Yes, on net profits.

874 Q. How long have you known Commissioner Chadwick?

A. Since 1907.

Q. Is he an engineer?

A. Not to my knowledge.

Q. And you are an engineer and have been for some years?

A. Yes.

Redirect-examination—By Mr. Alexander:

Q. You didn't let any statements made by the Commissioner influence you, but relied upon his sworn testimony of facts, did you not?

875 A. Yes.

Q. When you testified on Parcels 239A and 264, you only testified to the fair and reasonable market value of the property, exclusive of the element of value due to the fact that the property was a parcel, or part of an actual reservoir site, is not that correct? Or, in other words, you didn't take into consideration any added value on account of the availability and adaptability of the parcel for reservoir purposes?

A. Right.

Q. You were simply testifying to the value of the farm, as to those properties?

A. Yes.

876 Q. Having been previously instructed by Senator Linson that the stated law of New York was that you could not give any added value on account of availability and adaptability for reservoir purposes?

A. Yes.

Claimant rests his case, to the right to calling three engineers in rebuttal, depending on case City puts in.

Adjourned at 3.20 p. m., to convene April 3, 1911, at 11 a. m.

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT—NEW YORK COUNTY.

877

In the Matter
of

The Application and Petition of
JOHN A. BENSEL, CHARLES N.
CHADWICK and CHARLES A.
SHAW, constituting the Board
of Water Supply of the City of
New York, to acquire real es-
tate for and on behalf of the
City of New York, under Chap-
ter 724 of the Laws of 1905,
and the Acts amendatory there-
of, in the Town of Hurley,
County of Ulster, New York,
for the purpose of providing an
additional supply of pure and
wholesome water for the use of
the City of New York.

878

Ashokan
Reservoir,
Section No. 15,
Parcel No. 733.

WILLIAM SAGE, JR.,
Claimant,
vs.

879

THE CITY OF NEW YORK,
Petitioner.

New York City, N. Y., April 3, 1911.

The Commission convened at 11 A. M. pursuant
to adjournment, at Room 700, No. 47 Cedar Street,
New York City.

880 Present—Hon. GEORGE E. WELLER, Chairman,
 Hon. FRED H. PARKER,
 Hon. GEORGE W. BATTEN,
 Commissioners of Appraisal.

APPEARANCES:

ARTHUR S. BARNES, Esq., for the Corporation Counsel of the City of New York.
 EDWARD A. ALEXANDER, Esq., for Claimant, Wm. Sage, Jr., *in re* Parcel No. 733.
 Witnesses: JAMES E. O'NEIL, ADDISON E. DEDERICK, JAMES McMILLIN, JACOB V. MERRIHEW, for Petitioner.

881

JAMES E. O'NEIL, called as a witness for the petitioner, and being first duly sworn by the Chairman of the Commission, testified as follows in regard to Parcel No. 733:

Direct-examination—By Mr. Barnes:

It is stipulated and agreed by and between counsel for the respective parties—that the testimony given by this witness heretofore before Commission No. 15, Ashokan Reservoir, as to his qualifications, may be read in evidence in this case with the same force and effect as if repeated at length herein.

882

Q. Mr. O'Neil, you are a quarryman?

A. Yes, sir.

Q. Have you examined Parcel No. 733, Section 15, Ashokan Reservoir proceedings?

A. I have.

Q. With a view to determine as to whether there were stone deposits upon the land?

A. I did.

Q. And with a view to determine as to whether such stone deposits have any added value to the land embraced in Parcel No. 733? 883

A. Yes, sir.

Q. Did you find, on the land embraced in Parcel No. 733, any stone deposits?

A. I found some stone had been taken from there.

Q. Will you describe to the Commission the stone deposits or quarries that you found, if any, on Parcel No. 733?

A. About 1,000 feet from the highway, north from the house, I find an opening in the ledge of rock about 70 feet long, 6 feet wide at south end, and about 14 feet at north end, about 7 feet deep. About 20 feet north, on the same ledge, an opening has been made 110 feet long, about 6 feet wide, at both ends, and about 20 feet wide in centre of the opening, and about 8 feet deep. About 500 feet north, on the same ledge, I find another opening, about 130 feet long, 8 feet wide on south end, and about 12 feet on north end. About 50 feet in the centre of this opening it has been worked about 40 feet to 50 feet wide and about 12 feet deep. 884

All these openings show there was flagstone taken out on the outside of the ledge, but as it was worked into the west the bed of bluestone became shifted and grew together in a tangled mass.

Q. Mr. O'Neill, where do you live? 885

A. West Hurley.

Q. How far do you live from this particular piece of land?

A. About two miles.

Q. How long have you lived at West Hurley?

A. I was born there.

Q. How long have you worked in the quarry business?

A. For thirty years.

886 Q. How long have you known this particular piece of land?

A. Oh, thirty, thirty-five years.

Q. Do you recall when the quarries that you have spoken of on this property were worked?

A. I do not.

Q. You own quarries in this section?

A. I do.

Q. And you bought and sold bluestone in this section?

A. I did.

Q. Bought quarries, have you?

A. I have.

887 Q. Ever sold any quarries?

A. I sold one.

Q. You have employed labor in quarrying stone?

A. I have.

Q. Have you done the actual quarrying yourself?

A. I have.

Q. You are familiar with the markets for bluestone?

A. I am.

Q. Can you state—will you state the market for the stone taken from this vicinity?

Chairman: You mean as to what place it is marketed?

888 Mr. Barnes: Where it is marketed.

A. It is marketed in the City of Kingston, particularly at Wilbur and Rondout.

Q. Those are divisions of the City of Kingston?

A. Yes.

Q. Did you examine all of the land included in Parcel 733 for the purpose of determining as to whether there were deposits of bluestone there?

A. I did.

Q. Have you described all you found?

A. All but one place.

Q. Describe that place.

889

A. That was right adjoining on the west side, there was a little place taken out there and it ran right on under this other man's property, so I didn't consider it worth while making any note of it.

Q. You found another place where stone had been taken out?

A. Yes, sir.

Q. Adjoining the property of the next owner?

A. Yes, sir.

Q. The ledge ran back?

A. Yes, sir.

Q. Basing your answer upon your experience as a quarryman, generally, and upon your specific knowledge of this particular property, in your opinion how much did the bluestone deposits upon 733 add to the value of the land as of May 22, 1909?

890

A. It didn't add anything to the value of the property.

Cross-examination—By Mr. Alexander:

Q. How long have you been in the quarry business, Mr. O'Neill?

A. For thirty years.

Q. And for the last five years you have been an expert witness for the City of New York?

A. For about four years.

Q. Over four years, isn't it?

891

A. Well, I went to work for the City of New York on the 9th of April, 1907.

Q. And since that time you have testified as a quarry expert for the City of New York in numerous cases where claimants made claims against the City of New York, in this very proceeding?

A. I have.

Q. Are you paid by the week, month, year or day?

A. I am paid by the day.

892 Q. How much are you paid, what compensation, for giving testimony?

A. Ten dollars a day and expenses.

Q. And during the last four years that you have been testifying as an expert for the City you have not been engaged in any other work, have you?

A. The first year, from April to November, I took my quarry run; then I stopped it at that time and have not worked it since.

Q. Since that time you have been steadily, solely employed as a quarry expert for the City of New York?

893 A. Not at all times, some of the times in between; some times I don't have much to do.

Q. But that has been the chief part of your business?

A. That has been the chief part of my business, and have had other work.

Q. Over how long a period of time has your quarry experience extended?

A. Well, I worked a quarry for thirty years and worked for my father before that to learn the business. I went in the quarry first, to work, when I was twelve years of age.

Q. For your father?

A. Yes.

894 Q. How old are you now?

A. 53.

Q. So you have been working at the quarry business, off and on, for about forty years?

A. Yes, but between times I was at other work.

Q. I said "off and on"?

A. Yes, I use to go to school in the winter time.

Q. I said "off and on," that describes it accurately, doesn't it?

A. Yes.

Q. When you first started to work in your father's quarry when you were twelve years old, what work did you do?

A. I started to drive the horse and cart and take the rubbish away. 895

Q. When did you first start in on your own account?

A. I think it was in '82.

Q. Well, about how old were you then?

A. About 25.

Q. Then, for about 28 years, you have been working quarries on your own account, for your own benefit?

A. Yes.

Q. During that period of time did you ever buy a quarry on your own account, with your own money?

A. I did. 896

Q. If so, where?

A. I bought about fifty acres of land with a quarry on, it was then about half a mile of the West Hurley depot—

Q. When?

A. I should judge that was about fifteen years ago.

Q. From whom?

A. From my brother.

Q. What was his name?

A. D. J. O'Neil.

Q. Is he living?

A. He is living at Kingston. It was part of my father's estate. 897

Q. Outside of your father's estate, did you ever purchase property for a quarry from any stranger?

A. I bought thirty acres of quarry land from the Cornell estate.

Q. When?

A. I should judge that was about fifteen years ago.

Q. At the time you bought those thirty acres did they contain a worked out quarry, or an undeveloped quarry?

- 898 A. They contained both.
 Q. That is a partly worked quarry?
 A. Some of them were worked out and others were being worked.
 Q. Well, where was that quarry located?
 A. About three-quarters of a mile from the depot at West Hurley.
 Q. In the same vicinity of this quarry?
 A. Yes.
 Q. After you bought that quarry did you work it?
 A. No.
 Q. What did you do with it?
 A. The men that worked it paid no rent.
 899 Q. What rent?
 A. They paid me 5%.
 Q. Of what?
 A. On the dollar.
 Q. Of all stone that was delivered to the market?
 A. That is 5% of all sales of stone taken from that quarry by them.
 Q. Did they work the quarry?
 A. They worked it until they got ready to leave it.
 Q. How long did they work it?
 A. One winter.
 Q. How much did you make out of that in royalties that winter?
 900 A. I made about four dollars.
 Q. That is all you made, then?
 A. Yes.
 Q. How much did you pay for the quarry?
 A. For the land?
 Q. Yes.
 A. Fifty dollars.
 Q. You bought it because it was quarry land?
 A. I bought it because it was quarry land, and because it had a pond where I could get some ice.
 Q. You bought it chiefly because it was quarry land?

A. I bought it chiefly because it was quarry land and because there was a pond where I could get ice. 901

Q. After you got four dollars in royalties out of it, did anybody else continue to work the quarry?

A. No.

Q. So that is all you got out of it?

A. Yes.

Q. So your judgment of the value of that quarry, in that instance, was wholly wrong?

A. Oh, no, I would not take fifty dollars for the thirty acres to-day.

Q. Now, Mr. O'Neil, did you ever make a success of the quarry business in the course of your whole experience? 902

A. Oh, yes.

Q. Can you mention one instance?

A. Yes, this land that I bought, fifty acres—

Q. That is from your father's estate, your father bought that first?

A. Yes.

Q. I have sole reference to anything you bought from strangers, without referring at all to your father's estate, or to any quarries which your father bought, or which your brother bought, did you yourself ever buy a quarry from a stranger and make a profit out of it?

A. I want to explain that, if I am allowed.

Q. Answer the question, please, you can explain later. 903

Mr. Barnes: You need not answer, Mr. O'Neil, if you do not understand the question.

A. Well, if you put the question in that shape I cannot answer it.

Q. Why?

A. Because I bought this quarry that I worked for over twenty years, I bought it—

904 Q. (Interrupting.) Which quarry do you refer to?

(After some discussion the question "I have sole reference to anything you bought from strangers, &c.," read by stenographer to witness, who answered same "No.")

Q. Do you know whether that is one of the reasons why the City of New York selected you as a quarry expert?

A. No, I do not know.

Q. There are successful quarrymen up in the Ashokan district, are there not?

905 A. Yes.

Q. Mr. Samuel Coykendall bought and operated quarries at a profit, did he not?

A. He did.

Q. Can you mention any others that bought and operated quarries at a profit?

A. Yes.

Q. Will you please mention them?

A. Morrissey Bros. made some money up there. Lawson made some money up there—

Q. That is out of buying and operating quarries?

A. Yes, made it and lost it after he made it—

Q. That was out of buying and operating quarries?

906

A. Made it and lost it—to-day he is a poor man.

Q. Who else?

A. I don't recollect anybody else who made money and kept it.

Q. Well, when you say that they made the money out of the quarries and lost it, do you mean that they squandered it in some other enterprise?

A. I mean the quarries worked out and they lost what they made in the beginning.

Q. As I understand you then, these men would purchase a quarry, operate it, make profits out of

it, and then continue to operate it and finally lose either all or a part of the profits they had made? 907

A. Yes, that is correct.

Q. Then their judgment on the value of the stone in the quarries that they had partly worked was not good, was it?

Q. Well, it was good to a certain extent; that is, they worked these quarries until they worked them so far back that they got good stone, and when they got a certain distance back the stone commenced getting worse and they kept on because they had their plant there, had their way of working and had everything convenient to work, so they would still continue to work it until it got so bad that they lost all they got in the beginning. 908

Q. How do you know they lost it?

A. I do know.

Q. Generally speaking, you know.

A. You know most people's circumstances in the country.

Q. You have no personal knowledge of it?

A. Only in a general way.

Q. Hearsay?

A. Yes, and your knowledge of the parties.

Q. You really don't know whether these people ever actually made profits out of working these quarries, or not, excepting what you heard?

A. I know by looking at a quarry whether a man was making money or losing it. 909

Q. You would?

A. Oh, yes.

Q. All you would have to do would be to glance at it?

A. I would know from the way the stone was coming out; if they were coming out free and smooth, why then—and from the number of men working, I would know whether he was making a profit or loss.

910. Q. Would not you have to keep on looking from day to day during the operation of the quarry ?

A. Oh, no.

Q. You could tell in one day, if you saw the number of men he had and the character of the stone, you could tell whether he was making a profit or not?

A. I could tell for the time being; at that time.

Q. But only for the day you looked at the quarry?

911. A. If he had so much stone stripped there I could give an idea about how much it would cost to strip it, and how such stone he had from the number of men there, and what it would cost for the men—I could tell from all that, generally, what the quarry was worth, whether it was paying. If it was a rough quarry and it took three men to get out enough of stone for one man to cut, why then I could say that that man was running in debt every day he was working the quarry; on the other hand, if he had one man getting out the stone and three men cutting it, and they were smooth stone, why I would say that man is making money, and if rough stone, even if there were three men cutting and one man getting them out, and the stone were rough so the faces had to be worked over, and after they were worked if they were shaky or if they were of bad quality, or bad color, that would not sell good in the market, why I could tell, at that time, whether he was working it at a profit or loss.

912. Q. Well, then, your test was to see them work the quarry and to tell, from the condition of the stone as they took it out?

Q. Well, then, your test was to see them work the quarry and to tell, from the condition of the stone as they took it out?

A. Well, at that time to see if they were working at a profit.

Q. That is, you could tell if they were making a profit by seeing the stone taken out and the number of men on the job?

A. On that particular quarry.

Q. Does this test only apply to one particular quarry? 913

A. If the quarry wasn't working, you would go in there and size it up, look at the top and bed, if there was any, and see whether the seams ran straight and regular and if the color was good, or, if shifty and growed—and by the general appearance of the quarry, that is from a quarryman's standpoint.

Q. And yet these highly successful quarry operations, in actual, every-day practical work, had sunk their own profits by continuing to work these quarries, is that true?

A. Yes.

Q. They couldn't tell although their own money was at stake? Is that right? 914

A. Oh, yes; they could.

Q. But they didn't on this occasion?

A. Well, that is why I explained to you before—they had their plant there and had everything ready to work and kept on working so—

Mr. Alexander: I move to strike out the answer as being irresponsible.

The Chairman: Motion denied.

Mr. Alexander: I except.

Q. Has anyone of those successful quarry operators been called as a witness by the City, to your knowledge, in any of these proceedings? 915

The Chairman: If you know.

A. These men that I mentioned are dead.

Q. All of them?

A. With the exception of Lawson, who is over eighty years of age.

Q. He was not called by the City?

A. No.

Q. Was Mr. Coykendall?

916

A. No.

Q. To give values on any quarries in that section?

A. I have never heard of him being called.

Q. Outside of this one quarry of thirty acres that you purchased from a stranger, did you ever purchase any other quarries from strangers?

A. I did.

Q. When?

The Chairman: Give the date as near as you can.

A. About twelve years ago I bought fifty-seven acres of quarry and timber land.

917

Q. From whom?

A. Clinton Scoville.

Q. On that property was there a quarry?

A. There was.

Q. At the time you purchased this property was that quarry partly worked?

A. There were several quarries working on this property at the time; they were not worked, there was stone on it.

Q. Were they working the quarries?

A. Yes.

Q. Were they working the quarries profitably at the time you bought the property?

918

A. I would like to explain that I bought this quarry lot and didn't know the men who working until I got on the land and found two men working on the lot. I knew the quarry lot, perhaps all my life, and I bought it thinking that sometime I might want to work the quarries on it, and when I went on it to look it over, after I had bargained for it, and found these two men working on it, I told them I would not prevent them from working as long as they wanted to, so they worked there, I think, probably three or four or five months.

Q. After you bought these—had you seen this

land immediately prior to the time you purchased it? **919**

A. I had seen a part of it; there were fifty-seven acres and I had only seen a part of it.

Q. What did you pay for it?

A. Sixty-five dollars.

Q. How much money did you make out of the quarries on it?

A. I cannot remember how much in quarry rent, I can estimate it.

Q. Approximately.

A. Ten dollars.

Q. You lost on that transaction?

A. No.

Q. Well, is your judgment of quarries any better to-day than it was at that time? **920**

A. About the same.

Q. How much business—what was the best extent of business you did at any one time during your whole career?

A. About ten thousand dollars a year.

Q. Out of the ten thousand dollars a year business how much profit did you make during the year when you made the most net profits?

A. I couldn't say.

Q. Well, can't you give an approximate idea, whether you ever made a profit?

A. I made a profit; I couldn't say how much. **921**

Q. Well, can't you name, approximately, the profit you made in one year?

A. Why, I suppose I made three or four thousand dollars a year.

Q. That is the highest net profits that you made?

A. I think so.

Q. And some years you suffered a loss?

A. Yes.

Q. At the outside, during the whole game, from beginning to end, did you make any profit?

922

A. Oh, yes.

Q. Do you know the extent of the quarry business conducted by Mr. Coykendall up there, per annum?

A. I did not.

Q. You know it was more than a quarter of a million dollars a year, do you not?

A. I do not know.

Q. Know Julius Osterhoudt?

A. I do.

Q. He bought a partly worked out quarry up there for one thousand dollars, did he not?

A. I am not positive about that, I think he paid more.

923

Q. How much do you think he paid for it?

A. Fifteen hundred dollars.

Q. Do you know that he took two hundred thousand dollars worth of stone out of that quarry and sold the stone for that amount?

A. I do not know.

Q. You heard him testify to that in Kingston, did you not, before one of the Commissions?

A. Not in that form.

Q. In what form did he testify?

A. I couldn't say as to the two hundred thousand dollars. I heard him testify that there were several thousand dollars taken out of that quarry, but he didn't take it out, they were taken out just like any man can go in there and take them out on a royalty of five per cent.

924

Q. You forget how much they took out?

A. If I heard it, I suppose I forget it.

Q. Because that would be against the City?

A. Oh, no.

Q. Now, one year, out of the quarry business conducted by you, you made three or four thousand dollars net profit?

A. Oh, yes; more than one year.

925

Q. That was the highest net profit?

A. I think so, I would not be positive as to that.

Q. Was that profit made up of royalties?

A. Part of it.

Q. How much?

A. Why, about five hundred dollars a year.

Q. Out of the three or four thousand dollars?

A. Yes.

Q. How were the other profits made up? Profit off the stone?

A. Stone sold.

Q. That is the stone that you mined and sold in the market?

A. Yes.

926

Q. Out of the quarries you bought from strangers?

A. No, I bought this quarry that I worked for over twenty years, bought it from my brother.

Q. This profit came out of working that particular quarry?

A. Yes.

Q. You, yourself, had not bought that quarry?

A. Oh, yes.

Q. Originally?

A. My father had bought it originally. My father bought the land and I went in with him in company. When he died, in the settling up of the estate, this part of the property went to my brother and I bought him out. I bought the quarry I was already working.

927

Q. That is, you bought his interest in the business?

A. No, I bought his interest in the property.

Q. Wasn't the property in operation as a quarry at the time your father died?

A. It was.

Q. Did your father have any teams, implements and tools necessary to work the quarry, on hand?

928 A. There were no teams. He had some tools. He had one or two horses to work in the quarry.

Q. Didn't you buy out your father's interest in the tools and implements and horses, as well as this quarry?

A. No.

Q. To whom did they belong?

A. Part belonged to me, that is, not the horses, the tools, I owned my share.

Q. What became of the interest of your father's share, in the tools?

A. My brother owned them and he left them there and I used them. He didn't take them away. The horses he took away and sold.

929 Q. Then he gave you the tools?

A. Yes.

Q. You bought out a going concern there, did you not?

A. I did; I bought the land with the quarry on it.

Q. With the good will of the quarry?

A. Yes.

Q. Regular going business?

A. Yes.

Q. Your father had built up that business?

A. No, I built it up myself; my father had an interest in it, but I worked the quarry myself.

930 Q. You were working for your father on the quarry when you were twelve years old?

A. Not that quarry.

Q. When did your father buy that quarry?

A. My father bought the land just before—I think in 1860.

Q. From whom?

A. He bought it from Foster Dunwoody.

Q. How old were you then when your father bought that land?

A. I was three years old, about.

Q. After your father bought the land did he start to work the land as a quarry? 931

Chairman: If you know.

A. I think he worked one place on the land for a short time and then he bought another quarry, not on his own land.

Q. When did you start to go to work on this quarry? You were two or three years old when your father bought it, when did you start to work?

A. I think I had been working that quarry, before I went to work for the City, about twenty years; that would be about twenty-four years ago since I started in that quarry to work.

Q. How old were you then? 932

A. Twenty-six.

Q. What?

Chairman: About.

A. Twenty-four from 53—29.

Q. About twenty-nine years old?

A. Yes.

Q. Your father was working the quarry at that time, wasn't he?

A. My father and I bought out the land which was worked—

Q. (Interrupting.) You are getting two quarries confused? 938

A. No, I am not.

Q. You and your father together bought a working quarry?

A. Yes.

Q. That is the quarry you continued to work ever since?

A. Yes.

Q. That is the quarry out of which you made the bulk of your profits?

A. No.

934 Q. Your father didn't buy it himself?

A. No.

Q. You and he did?

A. Yes.

Q. Did you brother have any hand in it?

A. No. Practically, I bought it, but father agreed with me to buy it; I made the bargain and he did the talking.

Q. Your father helped you work the quarry?

A. My father came in the company but he never did much work.

Q. And the working of that quarry constituted the bulk of all the business you have done in the quarry line, during those 28 or 30 years?

935

A. Yes.

Q. What was the character of that quarry?

A. It was called a blue stone quarry; you got all kinds of stone, regular, platform and curb, &c., everything.

Q. During all these years you were actively engaged, were you not, in operating that quarry?

A. Yes.

Q. And you gave all your attention to working that quarry?

A. Why, I had other things to look after occasionally, but that was my principal business.

Q. During that period of time, you were not looking around inspecting other quarries, were you?

936

A. Occasionally, I would go in and look at other quarries.

Q. With the object in view of buying them?

A. With the object of looking them over and seeing who had a good quarry. It has been the rule of all quarrymen, as long as I can remember, that when a man opens up a good quarry, the other quarrymen in that vicinity, as soon as they can get a chance, would go and look at it.

Q. Why, won't they know whether it is good or not until it is opened up? 937

A. Not if it is covered up; sometimes they cannot see anything of it, sometimes they can.

Q. Where was this quarry that you and your father worked, and out of which you made the bulk of your profits?

A. That is the quarry that I own at the present time, about half a mile of the West Hurley depot.

Q. Where was the stone that you took out of this quarry sold?

A. At Wilbur and other places.

Q. Was there always a good market for the stone? 938

A. Well, sometimes there was, and sometimes there wasn't.

Q. You sold it all, didn't you?

A. We sold it in other places.

Q. What other places?

A. Why, I sold some at Cornwall, to Mead and Taft, sold stone at Dutchess County, sold stone to the City of Kingston, sold stone to private individuals in the City of Kingston, sold stone to monumental dealers, &c.

Q. You always found some market for the stone you took out?

A. I certainly did, or I couldn't have worked it.

Q. Now, the particular quarry on parcel 733, you examined that with the object in view of appearing here to testify as an expert witness in favor of the City of New York? 939

A. I did, yes, sir.

Q. And, of course, you examined it in the same way as you would examine something in which you intended to put your own money?

A. I did.

Q. Was there any blue stone in that quarry at all?

940 A. I didn't consider that there was any blue stone bed there but what had been worked out; it was all gone.

Q. No blue stone bed?

A. There isn't any there.

Q. The whole blue stone bed that had been there had been completely worked out?

A. I considered it so.

Q. What about the blue stone that you described in your direct testimony, that you described was shifted and growed?

941 A. Well, we call that, when it is shifted and growed, and all tied together, we consider that worthless, because you cannot take it apart and get any stone out of it; you cannot get it out at a profit, it cost so much to take off the top, and then when you come down to the blue stone bed and it is shifted and growed and tied together, you lose money taking out the stone, besides what it cost you to take the top off.

Q. Now, on a large number of cases where various different quarry experts, for various different claimants in these different proceedings, have testified that the blue stone found in different parcels of property was good and valuable blue stone, you have testified that such blue stone, in many of those instances, was shifted and growed, have you not?

942 A. I have.

Q. And probably, there have been as many as from fifty to sixty cases, where various different other quarry experts for claimants have testified, under oath, that such blue stone was valuable, it has been, in your opinion, in every one of these instances, that that blue stone was shifted and growed, or something else the matter with it?

A. You would have to state the cases precisely, in each one. I couldn't say there were fifty or

sixty cases where they swore there was blue stone, when I said there wasn't any. 943

Q. There were a great many?

A. Yes.

Q. You consider yourself a great expert on shifted and growed, tied in and gnarled blue stone?

A. I think I do.

Q. And the City of New York discovered you were a great expert witness along those lines?

A. I don't know what they discovered.

Q. Can you tell by looking at a blue stone bed whether it is shifty?

A. I certainly can.

Q. Describe just how you determine that? 944

A. I can tell by the nature of the rock.

Q. Describe the nature of the rock? Make it very clear, in detail, to the Commission, just how you tell that?

A. The rock if it lays in a pure bed it will be—it will look slippery, greasy; you will see in any kind of—most all the year round you will see the water, the trace of the water on the seams; if it is growed and tied up and it has a hard, gritty nature, the seams are dried, and if the water ever came out there, you will see the mark of the water, where it is dried up and that has got into a curly shape; then the seams will run and you can notice where they will go up and down, won't run level. 945
Where you see that condition on the side of a block of stone in the bed, you can make up your mind that you can't work that at a profit.

Q. That is the infallible test?

A. Oh, no. There are several other ways.

Q. What are the other ways?

A. Take the location of the ground, if there is slate mixed up with it. Notice a bed of stone and you will see a slaty seam starting in and that slaty seam if it started to run up toward the bed, why,

946 in nineteen cases out of twenty, it would run up until it would eat that bed completely out.

Q. Is that what you call a shift?

A. Oh, no.

Q. I asked is that the only test, and the infallible test?

A. Well, from the appearance of it in general.

Q. From the appearance that you have described?

A. And from the appearance of the block. It is just like buying a horse; you buy two bay horses of the same color and yet they are altogether different, and it is the same way with this stone. You
947 look at it, but there is something about one that is different from the other and that shows you they are not both alike, the same way in the bed of stone.

Q. You know lots of people are fooled in buying horses, don't you?

A. Yes, I have had that, too.

Q. And lots of quarrymen are fooled on these quarries?

A. They are liable to make mistakes.

Q. They sink their money in them?

A. They certainly do sometimes, and their labor.

Q. You don't claim to be infallible as a quarry expert?

948 A. I don't consider I am infallible.

Q. Now, have you ever seen this curly appearance on quarries and then tried to work them after that?

A. Yes.

Q. Just to see—

A. (Interrupting.) I have seen others do so, I have not tried them myself.

Q. Have you seen this appearance before they started in to work?

A. Yes.

Chairman: You would then be willing 949
to delegate the job?

A. (Continuing.) Why, I told you about these quarries—

Q. (Interrupting.) Which quarries?

A. Most any of them. When you take a quarry—

Q. (Interrupting.) Why not answer the question first?

A. I would like to explain—you asked me if I knew, if I ever worked any quarries that were tied up and growed.

Q. No, I didn't.

A. Then I beg pardon. 950

Q. I asked you whether you had ever worked any quarry which showed these symptoms?

Chairman: What symptoms?

Mr. Alexander: Tied up and growed.

A. Yes.

Q. Where was that quarry?

A. On the same quarry I own at the present time.

Q. Is that the only quarry that you have quarried and found those symptoms?

A. Most every quarry.

Q. In how many quarries did you find those symptoms when you worked them? 951

A. During the work, you will find a good block of stone, and fifty feet from that you will find a block of stone all tied up.

Q. Then you would not work it?

A. You would take it out and go on till you got a good one.

Q. You saw a bed here, on Parcel 733, that had these symptoms?

A. Yes.

952 Q. How do you know that if you worked that you would not find good blue stone?

A. In my judgment, from the location of that land, and the way it worked all along the front, it had been worked until they worked it all out what was there and that it would not come in again on the other side.

Q. Then, you are basing your whole judgment on the location of the land?

A. The location of the land, the look of the quarry, the quality of the stone, and the color of the stone.

953 Q. You cannot tell what is described as, what you call growed in and shifted stone, from the location of the land?

A. I can give my judgment on it.

Q. Whenever those symptoms appeared in the quarries you worked, you continued to work them and took out the growed stone?

A. I took out the growed stone because I knew what was on the other end.

Q. How could you tell what was on the other end?

954 A. If I worked a quarry from the north end and I had a thousand foot front, and came to a place fifty feet from the north end that had a bad place in it I worked that out to come here to where it was good—there are generally three or four places in a thousand feet that are bad, that would not probably pay to take out, but I would take it out to keep my quarry working in that way to keep the front.

Q. So that is the best description you can give of how you could tell that you would find good parts between growed in parts?

A. I would know from the lay of the ground; from the level seams.

Q. Can you describe to the Commission, in de-

tail, what there is in the lay of the ground that would indicate such a thing to the reasonable mind?

955

A. From a quarryman's standpoint, I can.

Q. I mean from a quarryman's standpoint?

A. You mean on Parcel 733?

Q. On any parcel?

A. Well, these quarries, these ledges, as a rule, run north and south; the side seams run north and south, the headoff runs east and west. Now, when a man starts a quarry, an opening, he generally begins on the west side, on the east side, and works to the west, yet there are others that I know that have been working from the west side—yet they were generally few—they will generally work from the east to the west. When you find a location where it droops down clear to the east, and the ledge is level, that is, the seams are level, on this side, and it rises up gradually to the west, and when it comes to a certain distance from the front part of the ledge, if it runs level on top there or inclined to raise a little, why you consider that if that bed of stone runs through there that you will have a quarry that you can work for a year or so. Where, on the other end, if this ledge of stone runs up here for a few feet and runs through a kind of a knoll and a point and then drops off to the west, takes a drop like that (indicating), you can make up your mind that when you get to the height you need not go any further, the quarry is gone.

956

Q. Is not the latter condition where the quarry is absolutely gone and valueless and worked out, the identical condition that you found in Parcel 733?

957

A. Oh, yes.

Mr. Alexander: That is all.

Took recess 12.40 o'clock, to be resumed at 1.45 o'clock.

958

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT—NEW YORK COUNTY.

In the Matter

of

The Application and Petition of
JOHN A. BENSEL, CHARLES N.
CHADWICK and CHARLES A.
SHAW, constituting the Board
of Water Supply of the City
of New York, to acquire real
estate for and on behalf of the
City of New York, under Chap-
ter 724 of the Laws of 1905,
and the Acts amendatory there-
of, in the Town of Hurley,
County of Ulster, New York,
for the purpose of providing an
additional supply of pure and
wholesome water for the use
of the City of New York.

Ashokan
Reservoir,
Section No. 15,
Parcel No. 733.

959

WILLIAM SAGE, JR.,
Claimant,

vs.

THE CITY OF NEW YORK,
Petitioner.

960

New York City, N. Y., April 3, 1911.

The Commission convened at 1:45 P. M., pursuant
to adjournment, at Room 700, No. 47 Cedar Street,
New York City.

Present—Hon. GEORGE E. WELLER, Chairman.
 Hon. FRED H. PARKER,
 Hon. GEORGE W. BATTEN,
 Commissioners of Appraisal.

961

APPEARANCES:

ARTHUR S. BARNES, Esq., for the Corpora-
 tion Counsel of the City of New York.
 EDWARD A. ALEXANDER, Esq., for Claim-
 ant, Wm. Sage, Jr., *in re* Parcel No.
 733.

WITNESSES:

JAMES E. O'NEIL, ADDISON E. DEDERICK,
 JAMES McMILLIN, JACOB V. MERRIHEW,
 for Petitioner.

962

ADDISON E. DEDERICK, called as a witness for the
 petitioner, and being first duly sworn by the Chair-
 man of the Commission, testified as follows, in re-
 gard to Parcel No. 733:

Direct-examination—By Mr. Barnes:

(It is hereby stipulated and agreed by and
 between the attorneys for the respective par-
 ties, that the testimony given by this wit-
 ness as to his qualifications before this Com-
 mission, in this proceeding, may be read in
 evidence in this case with the same force
 and effect as though repeated at length
 herein.)

963

Q. Mr. Dederick, you live where?

A. City of Kingston.

Q. Are you familiar with the property embraced
 in Parcel 733?

964

A. Yes, sir.

Q. This proceeding?

A. Yes, sir.

Q. Will you describe that property?

965

A. That property lies in the Town of Hurley, about two miles from West Hurley Railroad Station, near the hamlet called Glenford, the Glenford Road dividing the farm in two. This farm is very nicely situated against a rise of ground, part of it is below the bluff, part of it above the bluff. It has two streams of water running through it; there is an 8-foot well on the opposite side of the road from the barn, also a well near the house, stoned up with a curb and chain buckets on the same. Consists of about 27 acres of meadow and tillable land, 23 acres pasture land, $36\frac{1}{2}$ acres of brush, pasture and woodland. It has the following buildings: On the East side of the road, on the bluff, is a two-story house 16 ft. x 22 ft., 16 ft. high. On the East end of this house is a one-story addition, 16 ft. x 21 ft., 10 ft. high; on the West end of this house is a one-story addition, 16 ft. 6 in. x 21 ft., gable shingle roofs, lap siding on sides. There are three large rooms, one bedroom, one pantry, and the westerly end is used for a wash house, on the lower floor.

966

On the second floor, there are four bedrooms, one closet, an open attic, on the East extension, has a floor. The one-story addition at the West end is partly floored over. Underneath this house is a cellar, 14 ft. x 19 ft. 6 in., 7 ft. deep, stone floor, wooden steps leading to the same from the westerly addition, also under the main staircase.

Three large chimneys in the buildings; veranda in the front of the house, $5\frac{1}{2}$ ft. wide, 22 ft. long, shed roof, shingled, ceiled on a level underneath, with a stone floor in two large platform stone, edged off; has two large stone steps running the length of the veranda, 2 ft. wide, 3 in. thick, edged off.

Part of the house is in fair condition, part of it not so good. The walls are lathed and plastered, side walls, papered, ceilings kalsomined. 967

Around about the house, there are 24 bearing apple trees, 12 small apple trees, 5 pear, 8 plums, 12 cherry trees, one apricot; rose bushes and other shrubs. On the same side of the street, or road, there is a frame hen house, 14 ft. 6 in. x 20 ft., 8 ft. high, gable roof, covered with paroid roofing, lapped and novelty siding on the sides; it has three windows, one door, one inch floor, and is painted. Attached to this hen house is another hen house, 8 ft. wide, 18 ft. long, average height of 7 ft., with a shed roof, covered with paroid roofing, lap siding on sides, 4 windows and one door and no floor. 968

On the same side of the street, there is a smoke house 5 ft. 6 in. x 5 ft. 6 in., 6 ft. high, gable roof, shingled, lap siding on sides, one door, no floor, and is not painted.

On the same side of the street there is a frame toilet, 5 ft. 6 in. x 5 ft. 6 in., 7 ft. high, gable roof, shingled lap siding on sides, one door, and is painted.

On the opposite side of the road, below the bluff, there is a large frame barn, 30 ft. x 40 ft., 16 ft. high, gable roof, shingled, lap siding on sides; there is a barn floor running through this barn, 16 ft. wide. On the Westerly end, there are two horse stalls, five cow stanchions. On the Easterly end, a large bay, used for storing hay, poles overhead, large pair of double beams on the front and two single doors. This barn stands on a stone foundation, and is painted. There is a lean-to on the Westerly end of the barn, 16 ft. x 30 ft., 11 ft. high, shed roof, shingled, lapsiding on sides, one pair of double doors, stands on stone foundation, and is painted. In the rear of this barn is a hay 969

970 house or cow shed, as it may be termed, 17 ft. x 36 ft. 10 ft. high, gable roof, shingled, boarded and battened on sides, stands on stone foundation, and is not painted.

Near this barn, to the West is a granery, 12 ft. x 16 ft. 6 in., 8 ft. high, gable roof, covered with iron, boarded and battened on the sides; corn crib on the one side, grain bins on the opposite side, one inch floor, one door, stands on posts, and is painted.

A little from this, to the west, is a hog house, 12 ft. x 12 ft., 8 ft. high, gable roof, shingled, lapsiding on sides, first floor two inch floor, the second floor, one inch floor; has one pen, one door, stands on a stone foundation and is not painted.

971

On the woodlot, there is 40 pine trees, from 12 to 18 inches in diameter, there are 25 oak trees, from 12 to 18 inches in diameter; there are three large chestnut trees, 24 inches and over, in diameter; there are 25 hickory trees, scattered about the place, from 12 to 16 inches in diameter; 8 hard maple trees; there are fifty cords of different kinds of wood and twenty-five cords of pulp wood. I believe that is all.

Q. Mr. Dederick, what business are you in now?

A. General contracting business, real estate.

Q. How long have you been in the contracting business?

972

A. Since '83.

Q. And you are now actively engaged in building?

A. Building and dealing in real estate.

Q. What, in your opinion, was the fair market value of the land, with the buildings and all enhancements, embraced in Parcel 733, as of May 22, 1909, the day when the City acquired title?

A. \$5,500.

Cross-examination—By Mr. Alexander:

973

Q. That doesn't include any element of value for the use of the land for reservoir purposes, does it?

A. No.

Q. That doesn't include any enhancement of value, by reason of the fact of the stone quarry on the property?

A. No.

Q. What did you value the buildings and structures at?

A. \$2,845.

Q. How many acres of land are there in the property?

A. 86.489 acres.

974

Q. How much per acre did you place upon the value of the land, with all the timber, exclusive of the buildings and stone quarry?

A. \$2655.

Q. How much is that per acre?

A. Why, \$50 for some part—

Q. (Interrupting.) No, the average of the whole thing?

A. About \$30 an acre.

Q. How much did you consider the fair and reasonable market value of the timber on that land to be, including apple trees, maple trees, &c.?

A. I didn't put any separate item on the trees.

975

Q. How much did the value of those trees enhance the value of the property, in your opinion?

A. I didn't put any special value on the trees. If you would denude the land of all the timber and trees, it would reduce the price of the property at least five hundred dollars.

Q. Then you considered the property to be enhanced in value five hundred dollars by reason of the timber on it?

A. Yes, sir.

976 Q. So the land itself, then, exclusive of timber, buildings, quarry, its farming value, would be \$2155, or about how much per acre, for the tract?

A. About \$22 per acre.

Q. Do you know of any awards made by any Commission, even for the rottenest kind of swamp land in that section, to be as low as your figures?

A. Denuded of everything?

Q. Yes?

A. Yes, quite a number of them, I cannot point out any special property.

Q. Name one of them?

977 A. I think you will find the Lamphere property, in Section 6, denuded of all its buildings, trees and timber, will not any more than equal twenty-two dollars per acre.

Q. Will you swear to that positively?

A. I mean this, that I don't think it would exceed that. I don't really know what the figures were, or the awards made.

Q. How long have you been employed by the City of New York as a witness?

A. Since March 25, 1907.

Q. And you are now on the pay roll of the City?

A. When I work, yes, sir.

Q. By the day?

978 A. Yes, sir.

Q. Or week?

A. By the day.

Q. How many times have you testified in favor of the City in these proceedings?

A. About nine hundred times.

Q. And on any occasion covering the whole nine hundred times that you testified in favor of the City, has a single Commission, where there has been a contest between the expert for the claimants and you respecting the value of the land, ever

decided that the value of the land was as low, or lower, than the testimony you gave? 979

A. Yes, sir.

Q. Can you mention one?

A. Yes, sir.

Q. Well, mention it?

A. The church property at Brown Station, the Albert Brown property, the Egbert Dederick property, the Hermann property, and a few others, which I cannot remember at the present time.

Q. And in the whole nine hundred cases, with the exception of the few you mention, every Commission has decided that the land was worth a good deal more than what you placed upon it? 980

A. Some of them a little more, some of them a great deal more, but as a general rule they have been a certain percentage higher than my figures.

Q. Now, the exceptions that you have mentioned in the nine hundred cases where you testified, were all before Commission 2, were they not?

A. Yes, sir.

Q. And several of them were set aside by the Court, were they not?

A. Yes, sir.

Q. All of them?

A. Yes, sir, most of them.

Q. The Courts would not stand for them? 981

A. No, sir.

Q. Now, you say all these buildings and structures on the property have a structural value of about \$2,845?

A. They have a real value of \$2,845.

Q. In their present condition?

A. Yes, sir.

Q. Less depreciation?

A. That is their real value.

Q. I show you a photograph which has been introduced in evidence here, marked "Claimant's Ex-

982 hibit G, February 21, 1911," and ask you if that is a photograph of the house on the premises?

A. It is.

Q. Will you explain to the Commission, in your own way, as a builder, what the cost of construction of that house is, mentioning each item of cost that goes into its construction, where you would get the labor from, in and around what locality, where you would get the materials, and the prices?

A. Well, sir, in the first place if I had the contract to draw the plans of that building, the first thing I would do would be to draw a set of plans and make a set of specifications—

983 Q. (Interrupting.) What would that cost you?

A. That would cost me about \$15.

Q. If you did it yourself?

A. Yes, together with my office help.

Q. You do that yourself?

A. I do that myself. I have a boy in the office who is almost an architect.

Q. They don't use architects in the country?

A. Very little.

Q. Fifteen dollars for that, for the plans and specifications?

A. Yes, sir.

984 A. (Continuing.) Then the next thing I would do, would be to make out a list covering every piece of timber that went into the construction of the building, every foot of siding required to cover the side, every foot of shingling that would go on the roof, every foot of flooring that it would take for floors, making a list of that stuff required. I would send a list to Binghamton, send a list to Jersey City, send a list to H. W. Palens & Co., send a list to W. J. Turck & Co.—

Q. (Interrupting.) Where is that?

A. In Rondout.

A. (Continuing.) Also to Albany and Tona-

wanda, requesting a price upon these materials, delivered at the station at West Hurley. 985

Q. Now, mention those items in this house, the amount of timber for flooring and siding?

A. I have not made a list of the number of feet of flooring for the construction of this building, but I can safely say it would require 6,500 feet of rough timber.

Q. For what purpose?

A. For sills, floor timbers and timbers.

Q. Does that include the floor?

A. No, sir.

Q. What is the present market cost of 6,500 feet of what you call rough timber? 986

A. Anywhere from \$18.50 to \$24.

Q. For what?

A. For this stuff.

Chairman: Per thousand?

The Witness: Yes.

The Witness: When I built the hotel at Stuyvesant last year, I bought timber at \$20.50 per thousand.

Q. Go ahead—what else?

A. Now then, take about 1,600 feet of flooring—

Q. How do you figure that out?

A. In my mind.

Q. What are the sizes of the rooms? 987

A. One floor, 15x21, one floor 14x21.

Q. How many square feet in that?

A. Why multiply that—

Q. You didn't do all that?

A. No, I will let you do it.

Q. Two floors, 15x21—

A. Now, you have all the flooring, how many feet in that?

(Mr. Alexander figures.)

988

Witness: It won't exceed 1,600 feet.

Mr. Alexander: 1,839 feet.

Witness: Got it right?

Mr. Alexander: Sure.

(Witness figures.) That is right.

Q. How many floors in the house?

A. Two floors in the main part of the house, one floor in the extension. I am unloading a car today from the South, which cost me \$18.25 a thousand.

Q. f. o. b. Kingston?

A. Yes.

989

Q. Pine?

A. Yellow pine.

Q. The same kind of material as the floors in this house?

A. It is much better.

Q. The same thing, isn't it?

A. About the same thing; that is, it fills the same purpose, but is a better floor.

Q. What is the total price for the flooring in this house?

A. Why, \$23.57.

Q. For all the floors that go in that building?

A. Yes.

Q. What would the labor cost?

990

A. Nine dollars to lay the floors.

Q. And about \$23 for the timber going into the floors?

A. Yes.

Q. So that you could construct all the floors in this house, complete, for about \$32?

A. \$33, yes, sir.

Q. Now, what would the other parts of construction of the house cost?

A. \$10 a thousand on the timber would be the labor and nails.

Q. Well, how many thousands do you figure? 991

A. 6,500; that would be \$65.

Q. So that, \$98 would be the cost of all of the timber for the flooring, and of all of the labor necessary to construct the floors, and also to construct the other timber work that went into the house?

A. Yes, sir.

Q. What other parts of the house would require the outlay of any money?

A. Siding.

Q. What would that cost, in your opinion?

A. I unloaded a car from Seattle about a month ago, that cost me \$26.25 a thousand.

Q. Also a good deal better than in this house? 992

A. Sure, much better.

Q. How much of that siding would be required in the construction of this house?

A. 2,500 feet.

Q. At how much a thousand?

A. \$26.25.

Q. How much would that total at?

A. \$65.70.

Q. What other material would be necessary in the construction of that house?

A. Shingling.

Q. How much would the total shingling cost?

A. The shingling for that house would cost about \$78. 993

Q. What other materials?

A. The cornice; there is about 160 lineal ft. of cornice, which would be an average cost of 30c. per foot.

Q. Figure it out, how much would that be?

A. \$48.

Q. What other materials would be necessary?

A. There would be fifteen windows also.

Q. What would they cost?

A. \$8.

994

Q. Altogether?

A. \$120.

Q. For fifteen windows?

A. Yes, sir.

Q. What other materials would be necessary?

A. There are 16 doors, at \$10, which would be \$160.

Q. Anything else?

A. Yes, sir,—about 400 ft. of base, worth about .08c. per foot, that is \$32.

Q. What else?

A. 500 yds. of plastering, worth 40c. a yard.

Q. That is \$200?

995

A. Yes, sir.

Q. What else?

A. Three brick chimneys, worth \$20 a piece.

Q. That is \$60?

A. Yes, sir.

Q. What else?

A. There is seventy perch of stone for foundations, cost about \$120.

Q. What else, if anything?

A. The painting, about \$160—painting and papering.

Q. What else?

A. Two platform stones under the veranda, worth about 40c. a square foot.

996

Q. How many square feet?

A. They would be worth about \$44.

Q. What else?

A. That is all.

Q. Any fences around the house?

A. Not to amount to anything.

Q. Are there any?

A. Rough stone fences, laid up on the westerly side of the house, and a wire fence in front of the house.

Q. What would wire fences cost to put up?

A. Oh, probably 10c. a running foot. 997

Q. How many running feet?

A. I don't know, I didn't measure that.

Q. Would you put up a fence similar to that you saw, at 10c. per running foot, to-day?

A. A new fence probably would cost 20c; this isn't a new fence.

Q. Did you include in the structural value, the wells on the property?

A. I knew the wells were there, I took them in connection with the land.

Q. Now, that is one building,—the total of the figures that you have given is \$1125. What other buildings are there?

A. There is a chicken house, 14 ft. 6 in. x 20 ft., 8 ft. high, gable roof, shingled— 998

Q. What would that cost?

A. Cost about \$60 new.

Q. Of what does that consist?

A. Consists partly of lapsiding, partly of novelty siding, partly of paroid roofing and rough floor.

Q. How much is the lapsiding as it exists in that house?

A. Worth \$25.

Q. How much is the other siding?

A. About the same price.

Q. How much is the roofing? 999

A. Roofing, worth about $3\frac{3}{4}$ c. per sq. ft.

Q. How many square feet are there?

A. About 250 ft.

Q. $3\frac{3}{4}$ c. per square foot?

A. Yes.

Q. Anything else connected with that chicken house?

A. 3 sash, worth \$1. a piece.

Q. Anything else?

- 1000 A. One door, worth \$1.50; rough flooring worth 04c. per square foot.
 Q. You figure the whole thing worth \$60?
 A. Yes, sir.
 Q. What other buildings?
 A. There is a chicken coop worth about \$40.
 Q. What other buildings?
 A. Smoke house, $5\frac{1}{2} \times 5\frac{1}{2}$, worth ten dollars; toilet, $5\frac{1}{2} \times 5\frac{1}{2}$, 7 ft. high, worth about \$15.
 Q. That constitutes all the buildings and structures on the property?
 A. No, sir.
 Q. What else?
- 1001 A. Barn house, hog house, grainery, wagon house and shed.
 Q. What is the barn worth?
 A. \$900.
 Q. What else is there there?
 A. There is a wagon house and shed, worth \$460; grainery worth \$100.
 Q. What else?
 A. Hog house, worth \$40.
 Q. What else?
 A. That is all.
 Q. What did you give as the total value?
 A. \$2855.
 Q. I am not up to that mark.
- 1002 A. I can explain the discrepancy.
 Q. How do you explain the discrepancy?
 A. Because the property is worth more than the structural value of the buildings.
 Q. How do you explain that when you figure out the structural value, in detail, you get the total amount to be less than the structural value of all the buildings, which you gave?
 A. For the simple reason that these buildings enhance the value of the property beyond their structural cost.

Q. Then you didn't give their structural value? 1003

A. No, I gave you the value of the buildings as I though they increased the value of this property.

Q. How much did you figure they increased the value of the property?

A. I put a lump price on each building, thinking it worth so much.

Q. What was the value you first gave?

A. \$2855 is the present value of the buildings.

Q. Since the structural value of the buildings is \$2750, you would consider that all those buildings increased the value of the property to the extent of about \$100, over and above their actual cost?

A. Yes, sir.

1004

Q. So that if you, as a real estate dealer, bought a piece of vacant land and paid its fair market price, put a lot of suitable buildings on it, suitable to the locality,—after you had actually laid out the total cost of those buildings, you would consider that if you got a profit of \$100 on the whole transaction, that that would be the fair enhancement of value?

A. I don't.

Q. Yet, as an expert for the City of New York, you are willing to come in here and swear positively that the fair and reasonable market value of those 86 acres of land, with all these buildings on it, is worth only \$5,500? 1005

A. Yes, sir.

Q. Did you examine this property in connection with any other witnesses for the City?

A. I did.

Q. With whom?

A. Mr. McMillin.

Q. Who else?

A. Mr. Merrihew.

Q. Are those witnesses both here?

1006

A. Yes, sir.

Q. Has Mr. McMillin been your side-partner in these different cases?

A. Yes, sir, Mr. Merrihew as well.

Q. You always agreed?

A. No, sir.

Q. Have you ever differed to any appreciable extent in cases where you have testified?

A. We have.

Q. Mention one of them.

A. This is one.

Q. Is this the only case where you have differed?

A. No, sir.

Q. What other cases?

1007

A. Different cases.

Q. To what extent?

A. Sometimes I would be higher, sometimes they would be higher.

Q. Would there be a difference in any case of more than one hundred or two hundred dollars between you?

A. A difference of five and six hundred dollars, according to the value of the property.

Q. Has that happened many times?

A. It usually happens; there are no two men of one mind.

Q. It usually happens?

1008

A. Yes, sir.

Q. In how many cases have you testified with Mr. Merrihew?

A. Well, I cannot say.

Q. Approximately?

A. Probably a dozen.

Q. Can you mention one of those cases where you were five hundred dollars apart?

A. The Van Steenburgh property, over in Section 14.

Q. Is that the only case?

A. I think not; I think there are other cases, but 1009
which particular ones I could not be safe to recall.

Q. That is the one you remember?

A. Yes, sir.

Q. How many times with Mr. McMillin?

A. 200 or 300.

Q. On all of those two hundred cases, have you
and Mr. McMillin ever been \$500 apart in the
valuation of the property?

A, Yes, sir.

Q. Mention one of them?

A. Well, now, I don't know as I can. If I had
my book I could show you the different proper- 1010
ties. We always go over and value the property,
look over the land first, we size it up in our own—
what we think it is worth, each one makes a sep-
arate estimate of its value; when we get through
we sit down and consult, compare figures, and
make prices which we suppose is sufficiently large
enough to cover the value of this particular prop-
erty in question.

Q. You mean for your purposes as a City expert?

A. I am requested by the City of New York to
put a price on the property, which I think is its
real market value, between the willing buyer and
willing seller, and if there is a doubt in my mind,
I give the property owner the benefit of the doubt.

Q. Who made the requests to you in this case? 1011

A. Mr. Linson was my employer.

Q. How much do you receive a day for these
services?

A. Well, I don't know as that interests you, Mr.
Alexander.

Q. Yes it does interest me very much.

Some discussion had between all parties
as to the witness answering this question of
compensation. Witness told to answer.

- 1012 A. I receive Twelve dollars a day and expenses.
 Q. Are you ashamed of it?
 A. No, I think I ought to receive twice that.
 Q. How many days have you worked on this particular property, in valuing it?
 A. I think this is the fourth day.
 Q. Of what did that work consist?
 A. In going over this property, measuring it up, making a description of it, measuring the buildings, taking their condition into consideration and their value,—and each separate item which goes to make up the general item.
 Q. Is that property in a boarding house section?
- 1018 A. Yes, sir.
 Q. Was the property itself ever used as a boarding house?
 A. I would not consider that there was any more room there than was necessary for a man and his wife, running that farm, to live in; there are only five bedrooms.
 Q. I ask you if you know that it has ever been used as a boarding house?
 A. I understand it has.
 Q. Did Mr. Sacks keep quite a few cows?
 A. There is a place for five cows.
 Q. Sell milk to the boarders?
 A. I don't know what he did with it.
- 1014 Q. Was there any stone fences on the property?
 A. Yes, sir.
 Q. How many?
 A. I couldn't say.
 Q. Don't you consider stone walls to be of any value whatever?
 A. No.
 Q. None whatever?
 A. No.

Q. You didn't give them any valuation.

1015

A. No.

Q. You considered them to be a nuisance and detriment to the property?

A. Yes, sir, because they are only a snare for a row of brush on each side of those stone walls, and you are fighting them incessantly to keep the brush down, and the stones are continually rolling down into your meadow and into your pasture lands, and have to be replaced, and I consider it much cheaper to build wire fences than to tolerate stone walls.

Q. Have you ever constructed a stone wall?

A. I have helped draw stone to it and had a man lay the wall.

1016

Q. What does it cost, per foot?

A. I don't know now, it is so long ago.

Q. What is your judgment as to what it would cost?

A. I think perhaps it would cost from one dollar to one dollar and a half a rod to lay it,—16½ ft.

Q. About .06c. a foot?

A. Yes, sir.

Q. How many feet of stone wall were there?

A. I don't know.

Q. Did you value the wells on the property?

A. No, separate value.

Q. What do you consider it to be worth to construct a good well?

1017

A. Perhaps that would cost between \$50 and \$60.

Q. Would you construct one for that price?

A. I am not in the well business.

Q. Yet you are willing to place a value on the construction of that well in this case?

A. Yes.

1018 Q. You have been working as an expert witness for the City of New York continuously for the last three or four years?

A. Together with my contract work.

Q. You have been working for the City of New York?

A. Yes, sir.

Q. You have, of course, valued this property for your employer, haven't you?

A. I was employed by them to put a value on this property.

Q. And to come and testify in this case?

A. Yes, sir.

1019 Q. You don't want to see the claimant get any more than you think the City ought to pay?

A. Yes, sir, in my judgment and knowledge.

Q. Would you be willing to duplicate all the buildings, similar to those on this property, for \$2750?

A. Yes, sir.

Q. Would if you got the contract?

A. Yes, sir.

Q. Do you know what the average awards of the Commissions have been for lands, for average land, taking everything into consideration?

Chairman: If you know.

1020 A. Yes, the Commissions have varied in regard to their values. They have run all the way from 5% to 20% more than our figures.

Q. I don't mean that. All the Commissions appointed by the Court up there were appointed to value land. Do you know that?

A. Yes, sir.

Q. With the exception of the untried cases?

A. Yes, sir.

Q. If you add up the total amount of those awards and the total amount of acres on which awards have been made, and divide the one into the other, you get the average award, per acre, do you not? 1021

A. You do.

Q. Do you know what that average has been?

A. I do not.

Q. Did you consider it at all?

A. No.

Q. Those awards cover all kinds of land, do they not?

A. Yes, sir.

Q. Some village?

A. Yes, sir. 1022

Q. Some mountain land?

A. Yes, sir.

Q. Some swamp land?

A. Yes, sir.

Q. Some farm land?

A. Yes, sir.

Q. Also include water powers and other values of land and damages, do they not?

A. They do.

Q. You didn't look up the awards made for similar land to this by the different Commissions?

A. I didn't take that into consideration at all.

Q. If the actual awards made by the Commissions for similar land were twenty times the valuations placed by you on this land, would that alter your opinion? 1023

A. Not one bit.

Redirect-examination—By Mr. Barnes:

Q. Now, Mr. Dederick, you spoke of one or two cases, in Section 2, where the Courts had refused to confirm the awards that were made?

A. Yes, sir.

1024 Q. Were those awards equal in amount to your estimate of value?

A. Not the first time.

Q. That is, they were below your estimate of value?

A. Yes, sir.

A. Yes, sir.

Owing to engagement of Mr. Alexander, attorney for claimant, in another Court, "The People vs. Perez," it being, therefore, necessary to adjourn, this hearing is adjourned at 3 p. m., to convene April 4, 1911, at 10 o'clock.

1025

1026

UNITED STATES CIRCUIT COURT,

1027

SOUTHERN DISTRICT—NEW YORK COUNTY.

In the Matter

of

The Application and Petition of
 JOHN A. BENSEL, CHARLES N.
 CHADWICK and CHARLES A.
 SHAW, constituting the Board
 of Water Supply of the City
 of New York, to acquire real
 estate for and on behalf of the
 City of New York, under
 Chapter 724 of the Laws of
 1905, and the Acts amendatory
 thereof, in the Town of Hur-
 ley, County of Ulster, New
 York, for the purpose of pro-
 viding an additional supply of
 pure and wholesome water for
 the use of the City of New

1028

Ashokan
 Reservoir,

Section No. 15,

Parcel No. 733.

WILLIAM SAGE, JR.,
 Claimant,

vs.

THE CITY OF NEW YORK,
 Petitioner.

1029

New York City, N. Y., April 4, 1911.

The Commission convened at 10 o'clock, pursu-
 ant to adjournment, at Room 700 No. 47 Cedar
 Street, New York City.

1030 Present--Hon. GEORGE E. WELLER, Chairman;
 Hon. FRED H. PARKER,
 Hon. GEORGE W. BATTEN,
 Commissioners of Appraisal.

APPEARANCES:

ARTHUR S. BARNES, Esq., for the Corporation Counsel of the City of New York.
 EDWARD A. ALEXANDER, Esq., for claimant, Wm. Sage, Jr., *In re* Parcel No. 733.

WITNESSES:

1031 ADDISON E. DEDERICK, JAMES McMILLIN,
 JACOB V. MERRIHEW, for Petitioner.

It is hereby stipulated and agreed between counsel for the respective parties, that the present claimant paid \$4500, in cash, as the purchase price of Parcel No. 733, and the ordinary incidental expenses involved in every real estate transaction.

1032 JAMES McMILLIN, called as a witness for the petitioner, and being first duly sworn by the Chairman of the Commission, testified as follows in regard to Parcel No. 733:

Direct-examination—By Mr. Barnes:

It is hereby stipulated and agreed by and between the attorneys for the respective parties, that the testimony given by this witness as to his qualifications before this Com-

mission in this proceeding may be read in evidence in this case with the same force and effect as though repeated at length herein. 1033

Q. Mr. McMillin, you have examined the property known as Parcel 733 in these proceedings?

A. I have.

Q. Did you hear the description given by Mr. Dederick, the witness who testified yesterday?

A. I did.

Q. And, in your opinion, is that a correct description of the property?

A. Practically so.

Q. Have you anything that you wish to add or detract to that description? 1034

A. I don't recall whether he mentioned the fact that there was a quantity of stone and flagging around the building.

Q. You will add that, at any rate?

A. Yes.

Q. With that exception you accept his description as being correct, and as your own?

A. Yes.

Q. What, in your opinion, was the fair market value of the land embraced in Parcel 733 as of the time the City of New York acquired title to the same, May 22, 1909?

A. \$5,500. 1035

Commisisoner Parker: Exclusive of quarry?

The Witness: Yes.

Cross-examination—By Mr. Alexander:

Q. How old are you, Mr. McMillin?

A. Fifty-seven St. Patrick's Day past.

Q. What is your business?

A. At present, farmer.

1036 Q. How long have you been a farmer?

A. Why, practically all my life. I have had some work, outside work.

Q. And where was your farm?

A. Near Broadhead Bridge, in the Town of Olive.

Q. How many acres did your farm consist of?

A. Ninety-four acres.

Q. And you owned that farm, practically for how long?

A. Why, I think I have had title to the farm for a matter of—since '95 or '96.

Q. 1895 or 1905?

1037 A. 1895 or 1896. Since the death of my father --about that time—he formerly owned it.

Q. Up to that time your father owned it?

A. A great many years.

Q. Know what he paid for it?

A. I know what he paid for the land; there were no buildings on it when he bought it.

Q. When did he buy it?

A. He bought it about, around 1856.

Q. What did he pay for the land?

A. There wasn't as much land as there is now—I think he paid \$500.

Q. For how many acres?

1038 A. I think there was about 73 acres in that purchase.

Q. He paid \$500 for that in 1857?

A. Around or about '56.

Q. And then was this other land, making up the 94 acres, added to the original 73 acres?

A. Yes.

Q. When was that purchased?

A. Why, at different times since. I purchased once 11½ acres myself, individually.

Q. When?

A. About '95.

Q. 1895?

1039

A. 1895.

Q. What did you pay for that eleven acres?

A. \$110.

Q. Ten dollars an acre?

A. Practically, yes.

Q. What kind of land was it?

A. Why, it was land that about half had been cleared off and some part was growing up to brush and the remainder was good, timber land.

Q. Ever cultivated?

A. A part.

Q. How much?

A. Probably half.

Q. Worked out.

1040

A. No, this wasn't land worked out, it was simply neglected.

Q. How long had it been cultivated?

A. I think only a few years.

Q. Did you build on the property?

A. Not on the eleven acres.

Q. Had your father built on the 73 acres?

A. He had a house and barn and some other buildings, I think.

Q. What did he pay for them?

A. I couldn't say as to that.

Q. Did the City of New York take title to your property?

1041

A. Not to any part that had been built upon.

Q. Did it take title to any part?

A. Yes.

Q. How much?

A. 21.6 acres.

Q. Did it make an award to you?

A. It did.

Q. How much?

A. \$3550.

Q. Did you testify as a witness?

1042 A. I did.

Q. What valuation did you place upon the 21 acres?

A. Well, I don't just recall that.

Q. More than \$3550?

A. It was, including the damage to the remainder of the property.

Q. How much was it, more than \$5,000?

A. Well, I am not positive just what I considered the damage.

Q. Did the Commission find that this vacant land, consisting of about 20 acres, was worth approximately \$170 an acre for farming purposes?

1043 A. The greater part of that was timber land.

Q. But they found it was worth that?

A. Including the timber, yes. I presume that is the element they took.

Q. And your opinion is that this Parcel 733 on which you are now testifying as an expert for the City of New York, including all buildings, barn, hog house, hen house, timber, flagging, fences—which was testified to be in a very good location by the former witness—whose testimony you have adopted, that this land, with all improvements, is worth, in your opinion, about \$64 an acre. Is that so?

1044 A. I testified it was worth \$5,500; I have not figured it out.

Q. Well, figure it out, about \$64 an acre. And yet, your vacant land of 21 acres, when you testified on your own behalf against the City of New York, was worth over \$170 an acre, in your opinion?

A. There were other elements of damage considered, besides the value of the land.

Q. What other elements?

A. There was a question of a highway, to which

the City's witnesses, themselves, admitted a damage of \$500. 1045

Q. You mean there was a highway running through the land?

A. There was a public highway running over this land, which if closed to me would necessitate my buying a road out in another direction.

Q. Buying a road, or making it?

A. Buying it.

Q. Not building it?

A. I don't know whether I would have to build it.

Q. You testified as a witness when you testified?

A. I did.

Q. You were clear on the subject when you testified? 1046

A. I was clear as to the subject of getting a right of way out.

Q. In how many cases have you testified for the City of New York?

A. Since 1907?

Q. To date?

A. Not the entire time—I have not been—there has not been much doing this last season.

Q. Who engaged you as an expert witness for the City?

A. Senator Linson.

Q. And how are you paid, by the day, week, month or year? 1047

A. By the day.

Q. How much a day do you receive?

A. Ten dollars.

Q. And expenses?

A. Well, I have not up to this time got any expenses; I am going to try to get a little for coming this time.

Q. And, of course, you examined this parcel of land, No. 733, very carefully?

1048

A. I did, on two different occasions.

Q. What did you value the vacant land at, exclusive of all other considerations?

Chairman: If you did so value it.

A. Why, I divided up the land into different—

Q. (Interrupting.) I didn't ask you that. I will put it in a different form so as to make it perfectly clear. Did you place a value on the buildings and structures which were upon the property, separate from the land?

A. I did.

1049

Q. What valuation did you place upon them? Don't give me it in detail, give me the lump sum.

A. I considered the buildings enhanced the value of the property, \$2,845.

Q. That is almost identically the same amount as the former witness, Mr. Dederick, gave?

A. I think it is just the same.

Q. I think he said \$2,850; you are \$5 shy.

A. Perhaps I may be.

Q. Did you place any valuation upon the timber which was growing on the property, separate and apart from the other parts of the property?

1050

A. I didn't at that time place a separate value on the timber, still I had in mind what I thought the timber was worth, but included that value in the value of the pasture and brush land.

Q. What did you consider to be the value of the timber, separate and apart from any other value?

A. I considered the marketable value of all the timber and wood on that parcel, exclusive of fruit trees, to be about \$200.

Q. You heard Mr. Dederick testify that he considered it to be worth \$500?

A. I did.

Q. You differ with him on that point?

A. I don't know whether he included the fruit trees in his estimate or not. I don't.

Q. What do you consider the fruit trees to be worth, \$200? 1051

A. I am frank to say I cannot place a value on the fruit trees.

Q. It isn't worth anything?

A. It is worth something; it depends altogether on the character of the fruit, the condition of the trees, &c.

Q. Did those twenty-one acres that the City of New York took of your land, include the eleven acres you had bought?

A. It didn't.

Q. Excluded them?

A. Yes.

Q. You don't know anything about the value of Parcel 733, taking into consideration that element of value contained in the property, which is due to its being part of a natural reservoir site? 1052

A. In placing this value upon the property I took into consideration that it was part of the reservoir section.

Q. Why did you take that into consideration?

A. Because I knew it to be a fact.

Q. You don't know anything about valuing property for such purposes, do you?

A. I knew as a fact it was part of the system.

Q. You don't know anything about valuing property for such purposes, do you? 1053

A. I don't.

Q. How could you then take into consideration something of which you are totally ignorant?

A. I say I only take it into consideration so far as knowing it was part of the reservoir property.

Mr. Barnes (interrupting): He doesn't state this on a theory, simply he knows it to be so.

Q. How much value did you place upon the property, knowing that?

1054

A. I placed no particular value on that.

Q. Then you didn't take it into consideration. Have you ever been anything else but a farmer in the course of your experience?

A. Oh, yes.

Q. What?

A. I have been a merchant, and taught school in my days, have been a little in politics, Supervisor of the Town of Olive for five years, Fish and Game Protector of the district comprising Ulster, Albany, Green and Schoharie Counties—

Chairman: For how long?

The Witness: Nearly three years.

1055

Q. That is a State job?

A. Yes.

Q. What other political jobs have you held?

A. If you want the whole of them, I don't know that I can enumerate them. I have been Pastmaster, Chairman of the Board of Supervisors of Ulster County, Chairman of the Board of Equalization of the Board of Supervisors of Ulster County, on different Committees—

Q. Any others?

A. I don't know—

Commissioner BaBtten: You have been a delegate, I suppose?

1056

The Witness: I was a delegate to the Saratoga Convention when Mr. Coler was nominated for Governor, and also delegate to different other conventions.

Q. And the last political job has been expert witness for the City of New York?

A. I don't know whether that can be considered as a political job.

Q. Who had the selection of all those jobs?

A. Senator Linson, he selected me,—and Captain Fowler.

Q. He was interested I suppose at that time. 1057.
 Captain Fowler was the Democratic political leader of Ulster County at the time you were selected, was he not?

A. I don't know just what you mean by "political leader."

Chairman: How is all of this material as to the value of this parcel we are about to take?

Mr. Alexander: It is very material; it shows his experience of politics, but probably his lack of experience as a witness in valuing property.

Q. A great deal of your time was taken up with politics, was it not? 1058.

A. Not a great deal of it.

Q. Considerable time?

A. I had something to do when there was anything doing, generally, in that section.

Q. You didn't devote much time during that period of time in valuing real estate?

A. Not up to 1907.

Q. Up to 1907 you didn't devote much time to valuing real estate in that section of the country?

A. No.

Q. Then this job came up and you felt yourself fitted for the job? 1059

A. Yes.

Q. You applied for the job?

A. No.

Q. How did you get it?

A. I think I have answered that.

Q. Did they send for you?

A. Yes, I got a written letter from Senator Linsion before even it was known he was appointed as Assistant Corporation Counsel, that is, on the street.

1060

Q. What street do you now refer to?

A. Any street in the City of Kingston.

Q. This is a case of the office seeking the man?

A. I am telling the facts as they are.

Q. How had Senator Linson found out your great qualifications as an expert witness?

A. I could not answer that.

Q. Had you ever testified in any proceedings, before a court, where the value of land was concerned?

A. Why, I testified before the Court of Claims in Albany, where Senator Linson was counsel for some of the towns that were in controversy with the County, in regard to the litigation. I am not sure whether the question of land values came in at that time or not.

1061

Q. You were an old friend of Senator Linson?

A. I have been for a great many years.

Q. In addition to being a political friend, you were a personal friend also?

A. Yes.

Q. Had he ever acted as your attorney?

A. The firm of Linson and Van Buren had.

Q. How many times have you testified for the City since 1907, when you were sought out as an expert land witness?

1062

A. I couldn't tell you.

Q. More than a hundred times?

Chairman: About.

A. I testified in all the cases, I think, in Sections 6 and 7 of the Reservoir, Section 10 of the Reservoir, Sections 3 and 4 of the Northern Aqueduct, and a great many times before Commissions 11 and 12, 13 and 14, and I have been before Commission 4, Commission 1, a great many times, and before the present Commission a number of times.

Q. You have always been a pessimist on the value

of the land that went to make up this Ashokan Reservoir site? 1063

A. I don't think so.

Q. Except where your own property was concerned?

A. I don't think so.

Redirect-examination—By Mr. Barnes:

Q. Mr. McMillin, your property before it was taken, was located near a railroad station, was it not?

A. Yes, right adjoining.

Q. After the City acquires title to all the property there, will you be near a railroad station? 1064

A. It isn't at all probable.

Q. So that the property taken by the City affected your approach to the highway?

A. It did; it affected my approach to the highway.

Q. Did you have a highway opening on your property after the City acquired title to a portion of it?

A. Not a public highway.

Q. So that, in that award that was made, there was not only the value of the land, but a consequential damage to the remaining seventy acres?

A. I so assumed, and I would say further, that the City's own witnesses testified to a timber valuation on the part taken of over \$1,200. 1065

Recross-examination—By Mr. Alexander:

Q. Who was your counsel when your claim was tried?

A. Brown and Slawson.

Q. Who were the City's witnesses who testified in that case?

A. Matthias Burgher, Willard Marsh, Jesse V. Boice.

1066 Q. Did Mr. Boice testify for the City in other claims, to your knowledge?

A. Yes.

Q. He was a regular City witness?

A. He was on Sections 8 and 9.

Q. Before what Commission was your claim tried?

A. Before Commission 8.

Q. Jesse V. Boice is a regular City witness, isn't he?

A. He was at that time.

Q. How much timber was on your property?

1067 A. Why, I can only give you the value, I don't know how much timber there was.

Q. Didn't you know your own property?

A. Yes. I said I have not any record of the amount of timber on the part taken.

Q. Was this valuation of \$1,200 placed upon the timber on the part of your property that was taken by the City?

A. On the timber and wood, on the part that was taken.

Q. Who were the timber experts for the City who testified to the value of \$1,200?

A. Jesse V. Boice.

Q. He is a lumberman?

1068 A. He was at the time he resided in the Town of Olive.

Q. Have not you the slightest recollection as to the amount of timber on that part that was taken?

A. I have not the slightest recollection as to the number of trees, or the amount of feet of lumber computed from those trees. I think there were about fifty cords of cord wood and perhaps the same amount of pulp wood—I think I recall that part.

Q. You were familiar with that property all your life?

A. I certainly am.

1069

Q. Have not you any idea of the approximate amount of timber on the part taken?

A. I couldn't tell the amount of timber on that part taken. There were a lot of large telephone poles, I think upward of 300—

Q. What kind of timber was it?

A. Those were chestnut—

Q. What other kinds of timber?

A. Soft wood, consisting of beech, birch, maple, hemlock—and there was some oak.

Q. How many acres of land did the timber cover?

A. In the neighborhood of seven acres, I think.

Q. So that seven acres of timber land the City's witnesses valued at \$1,200?

1070

A. The timber and wood on those acres.

Q. Exclusive of the value of the land?

A. Yes.

Q. Or, in your case, about \$170 per acre for the timber and wood?

A. I think that is about right.

Q. Exclusive of the value of the land?

A. Yes.

Q. What valuation did the City's witnesses place on the land, exclusive of the value of the timber on it?

A. Why (hesitating)—

1071

Chairman: If you remember.

A. Why, I think somewheres between \$800 and \$900.

Q. For the seven acres?

A. For the whole twenty-one acres.

A. Why, I don't know what they put on that.

Q. You say that there was a highway leading from your land to the railroad station?

A. I did; I might say I constructed it, too.

Q. And the City cut off that highway?

1072

A. Cut off more than half a mile of it.

Q. Where is the new railroad station going to be, with respect to your land?

A. I couldn't say, Mr. Alexander.

Q. You know the railroad is going to pass through that section?

A. I don't.

Q. You have not the slightest suspicion?

A. My idea is chat it will run on the east side of the reservoir; I am on the west side.

Q. Where did you get that idea from?

A. It is so mapped by the City's engineers, and the people in that section have about calculated that is where it is going to run.

1073

Q. Nobody can tell what Mr. Coykendall will do, can they?

A. I cannot.

Q. How near was the nearest point of your property to the railroad station before the taking?

A. About 3/8ths of a mile.

Q. You call three-eighths of a mile near the railroad station?

A. Yes.

Q. How many feet would three-eighths of a mile be?

A. One-third of 5280 ft.

1074

Q. Figure it out please. (Mr. Alexander figuring) 1980 ft.—very nearly 2000 ft. from the railroad station.

A. I only make it 1480 ft. (Witness figuring) I made a mistake, 1980 ft.

Q. Before the City took title to any part of your property, the nearest point of your property to the railroad station was about 2,000 ft. from the railroad station, is that true?

A. That is in my judgment.

Q. I am only going by your judgment. You

want your judgment to make some impression on the Commission, don't you? 1075

A. Yes.

Q. Your judgment isn't shaky on any of these points, is it?

A. I don't think so.

Q. You have a good, calm, clear, disinterested judgment?

A. I think so.

Q. The nearest point was about 2,000 ft. from the railroad station?

A. Yes.

Q. You consider that to be very near the railroad station, don't you?

A. I do in that locality. 1076

Q. Through what part of your property did this public highway run?

A. It ran—

Q. (Interrupting) Through the centre, or along the side, or through what part of it?

A. It ran from the railroad station up to the buildings, where I lived. You might say, the southeast part of the farm.

Q. The public highway ran from the railroad station through a part of the farm?

A. Yes.

Q. Through the southeast corner of your farm? 1077

A. The southeast part, not exactly in the corner.

Q. It didn't cut your farm in two equal parts, did it?

A. It cut it in two parts, not in two equal parts.

Q. Cut it into one very small part and one very large parcel?

A. I should say it did.

Q. Do you know whether the City intends to re-locate that highway?

A. I know they do.

1078 Q. Where will the highway pass after the City re-locates it?

A. It will pass, why perhaps 300 yds. from the house.

Q. Through any part of your grounds that will be left?

A. It will pass about on the boundary line of the part taken by the City, and the part remaining.

Q. Will the City assess your property for any part of the improvement in making the new highway, or is that all done at the expense of the City?

A. Well, I understand it is done at the expense of the City.

1079 Q. How much damage did the City's witnesses allow you for re-locating this highway, or taking it away and making a new one?

A. Well, I would like to explain what they testified to.

Q. Does it require an explanation?

A. I think it does. I think their answer was on the assumption that I had to buy a right of way out. I think that is the way they answered that.

Q. They answered the question based on the assumption that you had to buy a right of way out?

A. Yes.

Q. Didn't you know at that time that the City intended to re-locate the highway?

1080 A. I didn't know, only from hearsay.

Q. You knew that the City was then taking steps to re-locate the highway, didn't you?

A. I think they were, but I am not quite sure. I think that was in 1908 the case was tried.

Q. From whom did you hear that the City intended to relocate the highway and give you a way out?

A. I heard it of counsel before different Commissions. The question came up a great many times.

Q. Did you hear it before your claim was tried?

A. I think so.

1081

Q. You didn't call the attention of the Commission to that fact, did you?

A. I didn't do it.

Q. And the City's witnesses who testified in that case, against your claim, assumed that you would have to buy a right of way out?

A. I don't know whether they assumed it, but I think they estimated an amount of \$500 damages if I did have to buy a right of way out.

Q. It makes a difference doesn't it, Mr. McMillin, whose ox is gored, yours or the other fellow's?

A. Not in that particular case of mine.

Q. It makes a difference, doesn't it?

1082

A. Probably in some cases.

JACOB V. MERRIHEW, called as a witness for the Petitioner, and being first duly sworn by the Chairman of the Commission, testified as follows in regard to Parcel #733:

Direct-examination—By Mr. Barnes:

It is hereby stipulated and agreed by and between the attorneys for the respective parties, that the testimony given by this witness as to his qualifications before this Commission, in this proceeding, may be read in evidence in this case with the same force and effect as though repeated at length herein.

1088

Q. Mr. Merrihew, have you examined the land embraced in Parcel 733, in this proceeding?

A. I have.

Q. For the purposes of determining the fair market value of the same as of the time the City acquired title?

1084

A. Yes, sir.

Q. You heard the description of that land given in detail by Mr. Dederick?

A. Yes, sir.

Q. And, in your opinion, was that description accurate?

A. Practically correct.

Q. Do you accept that description as your own?

A. Yes, sir.

Q. How long have you known this farm or land, embraced in Parcel 733?

A. In a general way, for fifteen or twenty years.

1085 Q. What, in your opinion, is the fair market value of the land embraced in Parcel 733 as of the time the City acquired title to the same, on May 22, 1909?

A. \$5,500.

Cross-examination—By Mr. Alexander:

Q. In placing that valuation, did you confer with Messrs. McMillin and Dederick?

A. I did.

Q. All agreed on that valuation?

A. Yes, sir.

Q. Didn't you hear Mr. Dederick testify that you didn't agree on the valuation?

1086 A. In other places.

Q. I mean on this particular parcel?

A. I don't know as I did. I don't know that we all had one price to start.

Q. Then you came together and agreed on it?

A. Yes, sir.

Q. If Mr. Dederick testified to the contrary he was mistaken, was he not?

A. Yes, because we agreed as to price on this particular property.

Q. How old are you, Mr. Merrihew?

A. Forty-nine.

Q. Living—where do you live?

1087

A. Town of Olive, Ulster County, New York.

Q. Lived there all your life?

A. Yes, sir.

Q. Who employed you as a witness for the City?

A. Everett Fowler.

Q. Have you ever been Supervisor for the Town of Olive?

A. Yes, sir.

Q. What other political jobs have you held?

A. Not very many. I was Assessor of the Town for many years; have been Supervisor for five years.

Q. Are those all the political jobs you have ever held?

1088

A. Yes, sir.

Q. What is your business?

A. Farmer.

Q. During all these years you have been a farmer and a local politician, have you not?

A. Not as much of a politician as Mr. McMillin; I spent more time in farming.

Q. Sort of keep your hands in politics a little?

A. I keep my eyes on things, as the boys say.

Q. Had you ever been an expert witness for the City prior to the time the City employed you in this proceeding?

A. No, sir.

Q. Did you seek this office, or did the office seek you?

1089

A. The office sought me. I never asked for a job.

Q. Did Captain Fowler send for you?

A. He called me on the telephone and told me to come to his office and see him on business. I went down two or three days afterwards, accepted the position and went to work.

Q. And you are paid how, by the day, week, month or job?

A. By the day.

- 1090 Q. How much a day?
A. \$10 a day.
Q. And expenses?
A. No. I put in a bill for expenses in the last few months, but I never received them.
Q. Don't they pay your traveling expenses?
A. They don't.
Q. And you had to take that out of the \$10?
A. I certainly did.
Q. You had never testified as a witness in any case where the value of land was concerned, before you got this job?
A. I didn't.
- 1091 Q. Well, how did Captain Fowler find out your qualifications as an expert witness, as to the value of land?
A. I don't know.
Q. In how many of these cases did you testify as an expert witness for the City of New York?
A. All the cases in Section 14, quite a number in 13 and 15; I don't recollect whether I ever testified before any other Commissions or not.
Q. More than two hundred times as an expert?
A. No.
Q. One hundred times?
A. Less than one hundred times, I think.
Q. Then you are not as experienced an expert
- 1092 as Mr. Dederick or Mr. McMillin?
A. No; I don't claim to be as experienced as those other gentlemen; they are older in the business.
Q. And yet, without being quite as experienced as the older hands on the job, you just happen to strike the exact valuation of \$5,500 that they place on the property?
A. That is my judgment.
Q. Is that your own judgment, or did they superimpose their judgment on yours, or how did it happen?

A. That is my judgment.

1093

Q. Your own independent judgment?

A. Yes.

Q. Based upon your farming and political experience in that section?

A. My knowledge of real estate in that section.

Q. Had you ever testified for any claimant?

A. No, sir.

Q. Did the City take any of your property up there?

A. Yes, sir.

Q. How much?

A. They took a quarry lot, woodlot, 22 acres.

Q. Took 22 acres altogether?

1094

A. Yes, that was separate from my farm, quarry land.

Q. As I understand it then, you had two lots of land, consisting of about 22 acres, which were entirely separate from your farm?

A. No, I had one. On another they took between seventeen and eighteen acres of my farm, besides those twenty-two.

Q. Was this twenty-two acres separate and distant and apart from your farm?

A. It was.

Q. And in addition to these twenty-two acres, separate and apart from your farm, did the City also take seventeen acres out of the farm?

1095

A. Yes, I think between seventeen and eighteen acres.

Q. Did you file a claim against the City for these two parcels of land that the City had taken?

A. I settled my claim with the City.

Q. What did you receive on the settlement for both of those parcels?

A. I received \$2,500 for the twenty-two acres, the quarry land. \$2,000 for the acreage taken from my farm for the damages arising from the taking.

1096 Q. Did you have a public highway running through the part of your farm that was taken?

A. I didn't.

Q. Were you near the railroad station? A. About three miles from Broadhead's Bridge.

Q. How near the railroad station?

A. About three miles from Broadhead's Bridge.

Q. How near the railroad station?

A. Three miles.

Q. So you got \$2,000 for about seventeen acres of land, three miles from the railroad station?

A. I did.

1097 Q. And in addition, the City saved all the expenses of the condemnation proceeding by settling with you?

A. They did.

Q. What did these seventeen acres of land consist of?

A. Most of it was farming land.

Q. Any buildings or improvements on the land?

A. No buildings.

Q. Was the land any good, in a state of cultivation?

A. Most of it.

Q. Any timber on it?

A. Very little.

1098 Q. What was the value of the timber on it?

A. Why, I don't think there was any timber on the land, just some wood.

Q. Why did you say "very little" timber?

A. Wood is considered timber.

Q. Any cord wood?

A. Some.

Q. How much?

A. Possibly eight or ten cords.

Q. What is it worth per cord?

A. One dollar per cord, on the ground.

Q. So, this \$2,000 was paid you for vacant land, was it not? 1099

A. Paid to me for tillable land and for damages.

Q. To the remainder?

A. Yes. The farm is cut; it was left in three pieces.

Q. You considered that to be a fair and reasonable value for your property that was taken, didn't you?

A. I did.

Redirect-examination—By Mr. Barnes:

Q. You say this \$2,000, Mr. Merrihew, was arrived at by agreement with the City? 1100

A. It was.

Q. So the City was saved the expenses of condemnation?

A. Yes.

Both sides rest.

There being no further business and no further witnesses before the Commission, the hearing stands adjourned for a viewing session in Kingston, at 11 a. m., April 17, 1911, and a hearing in Kingston at 11.30, April 18, 1911.

1102

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT, NEW YORK COUNTY.

In the Matter

of

1103

The Application and petition of
JOHN A. BENSEL, CHARLES H.
CHADWICK and CHARLES A.
SHAW, constituting the Board
of Water Supply of the City of
New York, to acquire real
estate for and on behalf of the
City of New York, under
Chapter 724 of the Laws of
1905, and the Acts amendatory
thereof, in the Town of Hurley,
County of Ulster, New York,
for the purpose of providing an
additional supply of pure and
wholesome water for the use of
the City of New York.

Ashokan
Reservoir,
Section No. 15,
Parcel No. 733.
William Sage,
Claimant.

Kingston, New York, April 17, 1911.

1104

Commission convened at 12:30 a. m. pursuant to
adjournment, and proceeded to Glenford, New
York, to view buildings, land and quarries on Par-
cel No. 733.

Present—HON. GEORGE E. WELLER, Chairman,
HON. FRED. H. PARKER,
HON. GEORGE W. BATTEN,
Commissioners of Apraisal.

At 5 p. m. adjourned to meet at Corporation
Counsel's office, Kingston, N. Y., April 18, 1911, at
11 a. m.

UNITED STATES CIRCUIT COURT.

1105

SOUTHERN DISTRICT, NEW YORK COUNTY.

In the Matter
of

The Application and Petition of
JOHN A. BENSEL, CHARLES N.
CHADWICK and CHARLES A.
SHAW, constituting the Board
of Water Supply of the City
of New York, to acquire real
estate for and on behalf of the
City of New York, under Chap-
ter 724 of the Laws of 1905,
and the Acts amendatory
thereof, in the Town of Hur-
ley, County of Ulster, New
York for the purpose of provid-
ing an additional supply of
pure and wholesome water for
the use of the City of New
York.

WILLIAM SAGE, JR.,
Claimant,
vs.

THE CITY OF NEW YORK.

1106

Ashokan
Reservoir,

Section No. 15.

Parcel No. 733.

1107

Kingston, N. Y., April 18, 1911.

The Commission convened at 11 A. M. pursuant
to adjournment at the Corporation Counsel's office,
Wall Street, Kingston, New York.

1108 PRESENT:—

Hon. GEORGE E. WELLER, Chairman,
 Hon. FRED. H. PARKER,
 Hon. GEORGE W. BATTEN,
 Commissioners of Appraisal.

APPEARANCES:

ARCHIBALD H. WATSON, Esq., (ARTHUR S. BARNES, Esq., of Counsel) for the Petitioner.

EDWARD A. ALEXANDER, Esq., For Claimant, WM. SAGE, JR., *In re* Parcel #733.

1108

FRANK BURHANS, called as a witness for the Petitioner, and being first duly sworn by the Chairman of the Commission, testified as follows:

Direct-examination—By Mr. Barnes:

Q. Mr. Burhans, you are acquainted with Parcel No. 733 in this proceeding?

A. I am.

Q. Have you been the owner of record of the land embraced in that parcel?

A. I have.

1110 Q. From whom did you purchase it?

A. Mr. Saxe.

Q. Do you know about the date?

A. I cannot remember the date.

The Chairman: Approximately.

A. I don't know as I can say approximately, there are so many different transactions.

Q. Did you, within the last three or four years?

A. Yes.

Q. You sold that property to whom?

A. Sage.

1111

Mr. Alexander: The date is on the record in this proceeding.

Q. Did you sell it to Sage?

A. I did.

Q. Wasn't Mr. Solomon DeLee the owner?

A. No.

Q. The transaction then was, that you bought it from Mr. Saxe and sold it to Mr. Sage?

A. Yes.

Q. You say that you cannot remember because there were so many transactions you were engaged in?

A. Yes.

1112

Q. You purchased this land from Mr. Saxe about August, 1907?

A. Yes.

Q. How long have you lived in Ulster County, Mr. Burhans?

A. Practically forty-four years this coming June.

Q. That is practically your whole life?

A. Yes.

Q. When did you first become acquainted with the fact that the City of New York was to acquire property in this section for the purpose of constructing a reservoir?

A. Why, I think in 1897, there was talk for the first of the City coming there.

1113

Q. And, since that time you have known that there was talk of the City purchasing until the present project was launched?

A. Yes.

Petitioner Rests.

1114

Mr. Barnes: I think that's all, Mr. Burhans,

Mr. Alexander: That's all.

The Chairman: All sides rest.

Mr. Alexander: Claimant files three affidavits with itemized bills from Cornelius C. Vermeule, Peter Elbert Nostrand and Robert E. Horton, and the claimant states that later in the week he will file verified bills from the farming and quarry experts.

The Chairman: Any objection to these?

Mr. Barnes: I haven't seen them.

Affidavits &c., handed to Mr. Barnes.

1115

Mr. Barnes: As to the bill of costs presented by the claimant for services of Cornelius C. Vermeule amounting to \$478.33:

First. If it please the Commission the objection is made to the charge for the services of this witness at the rate of one hundred dollars per day as highly excessive. Also the specific objection is made to the charge appearing under date of May 16th, paid assistant for preparing map, one day. It seems that is properly an office expense and should be covered by the fees of this witness, and also the same charge appearing under date of the 17th.

1116

It is submitted that the bill calling for day of the witness at one hundred dollars a day is highly excessive, possibly, not for the witness himself, his time may be worth that, but to put upon the City of New York a charge for the services rendered in this particular instance in covering the number of days, is highly excessive on its face and objection is made on that account.

As to the bill of Peter Elbert Nostrand for

\$731.93: That bill consists of charges for 1117
8 days at \$80 a day. Now, in the first place,
I want to say, if the Commission please, our
attitude is that Mr. Nostrand is not entitled
to anything. Mr. Nostrand's testimony given
before this Commission convicts Mr. Nos-
trand of very poor judgment or else of not
telling the truth, but in either event we take
it that the obligation should not be placed
upon the City of New York to pay wit-
nesses of that character.

The circumstances are, that Mr. Nostrand
for some two or three years testified upon
this very question and as the evidence before
this Commission shows, that in not a single 1118
instance did he testify that lands had a prac-
tical value for reservoir purposes and fur-
ther than that, his testimony before this
Commission shows that he specifically testi-
fied that it did not have any special value for
reservoir purposes.

Now, Mr. Nostrand had had considerable
experience in this locality, had acted as pur-
chasing agent for the Ramapo Water Com-
pany, in the employ of that company he had
bought a great number of parcels, some four
pages of record show the sales. He kept di- 1119
rectly in touch with this situation from that
time, some ten or twelve years ago, down to
the present date or down to the time the
City acquired title to the land for reservoir
purposes, which was in 1907. From that
time, to the year 1911, approximately, to
the first of June, 1911, or shortly thereafter,
Mr. Nostrand had been appearing before the
several Commissions and had been testifying
as to values; in the two and a half or three
years—two and a half years, Mr. Nostrand

1120

testified as he admitted, and the record shows, upon a number of cases, and every case had specifically testified that this land did not have a special value because of its adaptability and availability, for reservoir purposes. Now he comes before this Commission and testifies this particular land has. Now, are there any circumstances to justify that?

1121

This particular parcel is, a portion of it, without the flow line. In other words, portions of it will not be covered with water. That part was specifically called to Mr. Nostrand's attention, which was under water entirely, but he testified in his opinion there was no added value for reservoir purposes.

The Chairman: Was that while he was employed by the City of New York.

Mr. Barnes: Yes; Now, if the Commission please, its a rather serious accusation to make, but what is the motive for it? I forbore to ask Mr. Nostrand about his strained relations with the City, not caring to talk with Mr. Nostrand on that point.

1122

Mr. Alexander: I object to anything not on the record. When the witness was on the stand; and I object to counsel summing up and stating anything not in the record.

Mr. Barnes: I withdraw the statement. This witness testified before this Commission that he had been gouged out of one thousand dollars by the City of New York. Those are his very words; he testified for two and a half years for the City and said in his opinion the land had no added value for availability and adaptability for reservoir purposes and then switched around and gave a value of something like six hundred

dollars an acre, the greater portion being for its adaptability for reservoir purposes. 1123

We say that the record of the testimony of this witness is sufficient to justify the City of New York not to pay any more to this man, and objection is made to the payment of any sum, to Peter Elbert Nostrand.

Furthermore, we take it, that the charge of eighty dollars per day is highly excessive. The bill presented includes charges for preparation for one day and a half. The charge for examination of property one day, which I take, is preparation of the same property, is for four days, and also examination one day, giving a total of four hundred for examination and preparation as he terms it. 1124

There is also a charge here for five days in court. We fail to see the necessity for having witnesses in attendance for which the City of New York must pay, at every hearing, of witnesses of this character, who wish to give testimony as to special value based upon adaptable conditions.

The main point we make is, that this witness should not be paid a single cent. We don't think his testimony should be in the record; and he should not be paid.

As to the bill of Robert E. Horton for \$281.31: That bill seems to include charges at the rate of forty dollars per day. Now, Mr. Horton apparently was the most qualified of any of the witnesses presented before this Commission by the claimant, but yet, he puts in a bill for forty dollars a day, even that is excessive, but if Mr. Horton's time is worth forty dollars a day, by what authority does Mr. Nostrand put in a bill for one hundred dollars a day, he who testified first 1125

1126

on one side of the evidence and then on the other, because as he says, he was gouged out of one thousand dollars, as compared with a man of Mr. Horton's ability.

As to the time required for preparation by Mr. Horton is apparent from the face of the bill and appears to be excessive. As to the necessity of his testimony, of course the Commission is the judge and as to the sufficiency of the compensation, that is a question to be left with them so far as their recommendation to the Court, but I urge, in fixing the amount you will take very carefully into consideration the case of Peter Elbert Nostrand.

1127

The Chairman: You gentleman can agree upon the farm and quarry bills by the next hearing, if not you will have to notice us for a hearing on the 9th day of May at 47 Cedar Street, New York City.

Mr. Barnes: There will not be any trouble on that account.

Mr. Alexander: I would like to reply to the City's objection as to these bills. First I will take up the bill of Mr. Nostrand because he seems to be the target for attack.

1128

He testified as an expert for the City of New York for two and a half years and if he is the character of man Mr. Barnes now says he is, although Mr. Barnes did not use the word, the necessary implication from his language is, that Mr. Nostrand is a perjurer and his motive for committing perjury is, that he was gouged out of one thousand dollars by the City of New York. If that be true and this Commission should find that fact to be true, that he is a perjurer, then all those cases in which he testified on behalf

of the City of New York should be set aside because this man is a perjurer and gave perjured testimony, or his testimony was unreliable in all those cases, and they should be set aside forthwith. 1129

If your Honors will carefully read the testimony he gave before every commission when he appeared as an expert for the City of New York, you will see that Senator Linson was very careful to frame his questions on assumed state of facts. Senator Linson never asked Mr. Nostrand the question point blank, regardless of any assumed state of facts, but on the actual facts as they appeared. Do you consider that the fact that the particular parcel of property on which Mr. Nostrand was testifying was part of a reserovir site that that adds to its value? That question was never asked of him, and when I asked him on redirect examination, right in this case: "Q. Was not the testimony that you gave there, based on certain assumptions, applied to the particular parcel of land in question?" He answered, "A. Yes." 1130

Of course if those presumptions on the part of Senator Linson, were created for the purpose of wrong assumptions, then the testimony of Mr. Nostrand based on those wrong assumptions of fact give a wrong conclusion even though his conclusions were correct from this conclusion of fact. 1131

Then I asked, "Who gave you the basis for these assumptions?" And he answered, "Senator Linson." (Reading)

"Q. What did Senator Linson tell you to assume in that respect? A. That the cases indicated that where the property was one

1132

of a number of pieces of property that would enter into a reservoir site, that the courts had decided that it had no especial value on that account; that where a piece of property composed the land of a reservoir site, there the courts has, in some cases, decided that it had some special value.

Q. Did you accept his statement of the law was correct? A. Yes.

Q. Did you base your testimony on his assumption of the law? A. I did.

Q. In every instance where you testified on behalf of the City? A. Yes.

1133

Q. Did you feel that you were testifying accurately at the time, so far as the dictates of your own judgment were concerned? A. I didn't consider so much that it was a question of judgment; I thought it was a question of fact.

Q. Did you consider in giving the testimony that you did under Senator Linson's assumption, that you were testifying with fairness to the property owners? A. I hardly thought it was entirely fair to the property owners, excepting that it was a question of conditions.

1134

Q. A question of what he told you the law was? A. Yes.

Q. That is all your testimony amounted to on those cases? A. Yes.

Q. After Senator Linson was superseded by Mr. William McMurtrie Speer, were you retained by the City? A. In one case."

Then comes this question of dispute here. He said:

"He reduced my bill to the extent of one thousand dollars; Mr. Speer did.

Q. Did Mr. Speer ever ask you to appear as a witness? A. No. 1135

Q. Mr. Barnes? A. No."

Then he says; mind you this is after Mr. Speer found out what a terrible man Mr. Nostrand was:

"Q. In any of the testimony that you gave—
A. I would like to state that since the time that I ceased to do work for the City that Mr. Speer, through his representatives, caused to be placed in the records, a number of appearances, at least a number of statements, as to my values on various properties, having read into the record sworn testimony. 1136

Q. Now you testified concerning the fair and reasonable market value of various properties forming parts of this reservoir site, as a witness on behalf of the City, did you not? A. I did.

Q. Did you in any of these values, take into consideration the reservoir element of value? A. I took into consideration the fact that they were part of a reservoir, and only to that extent.

Q. You didn't take into consideration this reservoir element of value? A. I did not. 1137

Q. Simply testified to the fair and reasonable market value of these properties as farms, or for other purposes for which they were being used at that time, exclusive of any added values for reservoir availability and adaptability, isn't that right? A. Correct.

Q. Did you follow the awards the various Commissions made in those cases in which you testified? A. Not all, &c."

1138

Then I asked him this:

"Q. Do you know whether the Commissioners ever awarded less than the values which you gave, in a single instance? A. No, not that I know of."

That is when he appeared as a witness for the City of New York.

"Q. So that in all these cases where you testified for the City of New York, your estimate, so far as the Commissioners are concerned, was considered to be entirely too low? A. Yes.

1139

Q. But I presume you know that in this particular hearing, the same City of New York now questions the weight to be given to your testimony; you know that, don't you? A. It would appear so, &c."

Now, your Honors, when Mr. Nostrand was called on the witness stand, Mr. Barnes had the full opportunity to cross-examine him to his heart's content.

Mr. Barnes, representing the City of New York, had the right to call Senator Linson in as a witness, and has that full power to-day, and find out whether he, as counsel for the City, asked Mr. Nostrand any questions except on those assumed state of facts.

1140

The assumptions of Senator Linson were skillfully put, as the Senator is a very skillful lawyer, and had a perfect right to ask expert witnesses questions based upon certain assumptions of fact just the same as experts are asked every day, assuming certain facts to exist, what would be the result.

It did not follow in this case, that the facts the Senator assumed were correct, even though some evidence was. The objection is, that the assumption of fact made by Senator Linson was incorrect.

In this case we have absolutely proved 1141
 that the assumption of fact by Senator Lin-
 son has no basis, because I put Commis-
 sioner Chadwick on the stand. You will
 see from the evidence that they expected to
 sell water to the inhabitants of New York at
 ridiculously low prices and the cost of get-
 ting the water from the Catskills and getting
 it into the City of New York at very high
 prices. Commissioner Chadwick testified,
 and the true facts of the case have never
 appeared before any other Commission
 where this question is raised; he testified
 that the City of New York will make a net 1142
 profit of \$11,000,000 a year out of this enter-
 prise and in ten or eleven years the whole
 cost of the enterprise will be repaid from
 the gross receipts and forever thereafter,
 this enterprise will be earning for the City
 of New York at least, \$11,000,000 each year.

Had that assumption of facts been put
 to Mr. Nostrand when an expert for the City
 of New York, he could not have testified as
 he did, for the City. But to show the delib-
 erate unfairness with which all those cases
 were tried on behalf of the City, can be no
 better illustrated than by Mr. Nostrand's tes-
 timony when he appeared for the City; he 1143
 was willing to come forward and state as
 man to man, the real facts of the case and
 while testifying as to the absolute truth
 when testifying for the City of New York,
 he only testified as the records show, on the
 assumption of facts that were asked him
 and only testified to hypothetical ques-
 tions.

Now, that there can be no question but

1144

every parcel of this property which forms part of the reservoir site has had the opinion of such persons as Professor Burney of Yale University. When it is said a witness committed perjury—that's what I understood Mr. Barnes' comment on Mr. Nostrand to mean, its important to show there are men known to be honest and truthful who have testified to the same effect.

1145

Mr. Vermule is undoubtedly one of the greatest engineers in the country on the question of water supply. He has been called in as chief consulting engineer to the State of New Jersey and to its Legislature and to many of its Cities throughout New Jersey.

The first charge he recites in his affidavit that of the expenses included in his account were actually incurred and paid by him and for necessary and usual expenses in connection with the work performed; that the services rendered were necessary and proper; That he testified in the case of the People vs. Sage; that the charge for the services are usual and customary, &c.

1146

It may be that Mr. Vermeule is no greater engineer than Mr. Horton, but the rates charged by different engineers in different sections of the country are different. The same as other experts; take the city physician or city lawyer, may be no greater than the country physician or country lawyer, but it usual and customary to charge a higher compensation for his services.

Mr. Horton in my opinion was a remarkably able engineer and so was Mr. Vermeule.

Mr. Nostrand actually received more than forty dollars a day when he testified as a witness for New York City, his compensation was more than forty dollars per day, now they come in and say he should not receive anything. 1147

There is one other feature so far as the bills are concerned, and that is that the City of New York called no witnesses on this case, therefore all of the testimony of the three witnesses introduced for the claimants stands absolutely undisputed and the only question of the proper inference to be drawn from that testimony. 1148

There is no evidence in the case, not a particle, to show that this testimony was unnecessary, as Mr. Barnes claims, or that Mr. Nostrand exercised bad judgment, because if Mr. Nostrand exercised bad judgment then the other witnesses exercised bad judgment then all that testimony must be eliminated from the record.

Even assuming that your Honors come to the conclusion that it has no value for reservoir availability or adaptability, still these experts are entitled to compensation. The witness put on the stand where called in good faith as witnesses on debatable point is entitled to his subpoenae fees, otherwise we couldn't try cases. 1149

I am not going now into the questions of law underlying the case but just assuming for the purposes of argument that our contention is incorrect, even then are we not entitled to call witnesses to prove our contention?

Mr. Nostrand appeared as a witness, tes-

1150

tifying to these values of properties sold and the prices. Mr. Barnes asked him to give a list of all the properties he had bought for the Ramapo Company.

Mr. Barnes: I call your Honor's attention to Mr. Nostrand's testimony on page 388 of this record. (Reading.) "Q. In reference to parcel #264 did you testify — 'Q. In your opinion, Mr. Nostrand, is the market value of property increased by reason of the fact that it is one parcel of a number of parcels going to make up a reservoir site? A. It is not.' You so testified? A. I so testified."

1151

If the Commission please, if that statement on this record can be squared with the rest of Mr. Nostrand's testimony, I fail to see it.

Mr. Alexander: Taking up that question: Nobody can answer that question.

Q. In your opinion Mr. Nostrand, is it increased by reason of the fact, the one fact alone, "that it is one parcel of a number of parcels going to make up a reservoir site?"

Anybody would be an ass to answer that in any other way but, no. You would have to know a number of other facts.

1152

Is it a reservoir site that a number of persons demand for water supply purposes, or, is it a reservoir site that some community, such as a city or cities, demand, but the question which Mr. Nostrand was asked is a wholly incompetent question even though it was not objected to on that ground because it does not assume the necessary facts to enable a witness to give an intelligent answer and the only answer that could possibly be

given to that question is the answer that the witness did give. 1153

Nobody could say from the mere fact that a parcel of land was a part of a reservoir site that that would increase the market value of that parcel, but if there was a demand for this reservoir site, if this reservoir site was the most available or cheapest and best source of supply, then, and in that event, there would be a market value each parcel of land which was part of the site.

Mr. Barnes: That's all I have to say on the bills of cost.

Chairman: Both sides rest on bills of cost except for the other bills which you gentlemen will agree upon. Are you gentlemen ready to go on on your questions of law? 1154

Mr. Alexander: It will only take me about ten minutes.

Adjourned to May 9, 1911, hearing to be held at 47 Cedar Street, New York City.

1156

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT—NEW YORK COUNTY. . .

In the Matter

of

The Application and Petition of
 JOHN A. BENSEL, CHARLES N.
 CHADWICK and CHARLES A.
 SHAW, constituting the Board
 of Water Supply of the City of
 New York, to acquire real
 estate for and on behalf of
 the City of New York, under
 Chapter 724 of the laws of
 1905, and the Acts amendatory
 thereof, in the Town of Hurley,
 County of Ulster, New York,
 for the purpose of providing
 an additional supply of pure
 and wholesome water for the
 use of the City of New York.

1157

Ashokan
 Reservoir,
 Section No. 15,
 Parcel No. 733.

1158

WILLIAM SAGE, JR.,
 Claimant,
 against

THE CITY OF NEW YORK,
 Petitioner.

New York, May 9th, 1911.

Hearings held May 9th and 10th, 1911.

Commission convened, pursuant to adjournment

at Kingston, New York, at 11 a. m., 47 Cedar street, New York City. 1159

Present—HON. GEORGE E. WELLER, Chairman,
HON. FRED. H. PARKER,
HON. GEORGE W. BATTEN,
Commissioners of Appraisal

APPEARANCES:

ARCHIBALD R. WATSON, ESQ. (ARTHUR S. BARNES, ESQ., of Counsel), for the Petitioner.

EDWARD A. ALEXANDER, ESQ., for Claimant, WILLIAM SAGE, JR., *in re* Parcel No. 733. 1160

Various bills of costs of witnesses for the claimant taxed and finally fixed as follows:

Cornelius C. Vermeule.....	\$353.33	
Robert Horton.....	281.31	
Peter Elbert Nostrand.....	451.93	
Edwin Burhans.....	54.66	
Walter Lee.....	40.06	
Elmer E. Molyneaux.....	43.64	
John Van Kleeck.....	45.00	
John H. Saxe.....	45.00	
Virgil H. Winchell.....	57.28	1161

The Commission thereafter went into executive session and continued until 4:30 p. m., when it adjourned for the day.

1162

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT—NEW YORK COUNTY. . .

In the Matter

of

The Application and Petition of
 JOHN A. BENDEL, CHARLES N.
 CHADWICK and CHARLES A.
 SHAW, constituting the Board
 of Water Supply of the City of
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 estate for and on behalf of
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 Chapter 724 of the laws of
 1905, and the Acts amendatory
 thereof, in the Town of Hurley,
 County of Ulster, New York,
 for the purpose of providing
 an additional supply of pure
 and wholesome water for the
 use of the City of New York.

1163

Ashokan
 Reservoir,

Section No. 15.

Parcel No. 733.

WILLIAM SAGE, JR.,

Claimant,

against

THE CITY OF NEW YORK,
 Petitioner.

1164

New York City, N. Y., May 10th, 1911.

Continuation of executive session at No. 47 Cedar
 Street, New York City, at 10 a. m.

Present—HON. GEORGE E. WELLER, Chairman,
 HON. FRED. H. PARKER,
 HON. GEORGE W. BATTEN,
 Commissioners of Appraisal.

1165

Parcel No. 733 discussed and finally appraised at \$7,624.45 for the land and buildings and \$4,324.45 for the reservoir availability and adaptability, being a total of \$11,948.90.

Report drawn and signed by all Commissioners.
 Bills of cost of all Commissioners prepared and sworn to.

Adjourned *sine die*.

1166

APPENDIX NO. 1.

"Pursuant to chapters 723 and 724 of the Laws of 1905, the City of New York filed with this Commission on the 3rd day of November, 1905, its application for a new and additional source of water supply, which application consisted,

I. Of the petition made by the mayor, George B. McClellan, dated November 1, 1905.

II. A statement of the Board of Water Supply of the City of New York, dated November 1, 1905.

1167

III. A certified copy of a resolution by the Board of Estimate and Apportionment of the City of New York adopted October 27, 1905, approving and adopting the report and map of the Board of Water Supply of the City of New York.

IV. A report of the Board of Water Supply of the City of New York to the Board of Estimate and Apportionment of the City of New York, dated October 5, 1905.

1168 V. A report of William H. Burr, Rudolph Hering and John R. Freeman in relation to providing an additional source of water supply for the City of New York made to George B. McClellan, Mayor, Chairman of the Board of Estimate and Apportionment of the City of New York, dated January 16th, 1909.

VI. A report of J. Waldo Smith, Chief Engineer of the Board of Water Supply of the City of New York, dated October 7, 1905.

1169 VII. A report of the Commission consisting of William H. Burr, Rudolph Hering and John R. Freeman made to Robert Grier Monroe, Commissioner of Water Supply, Gas and Electricity, dated November 30, 1903.

VIII. A report of John R. Freeman to Bird S. Coler, Comptroller of the City of New York, dated the 23rd day of March, 1900.

IX. A map showing the proposed sources of water supply, reservoirs and aqueduct lines.

X. A small certified copy of such map.

XI. Two additional profiles.

1170 This application, with its maps and plans, contemplates taking a new and additional source of water supply for New York City in the Catskill Mountain Watersheds.

The Board of Water Supply of the City of New York, was directed by chapter 724 of the laws of 1905 to proceed immediately after its appointment "with all reasonable speed, to ascertain what sources exist and are most available, desirable and best for an additional supply of pure and wholesome water for the City of New York," and also to "make such surveys, maps, plans, specifications, estimates and investigations as it may deem proper

in order to ascertain the facts as to such sources," and to report to the Board of Estimate and Apportionment of the City of New York, concerning such water supply, with recommendations as to what action should in its opinion be taken with reference thereto, so that the Board of Water Supply and the Board of Estimate and Apportionment might be able to determine from what source or sources and in what manner the City of New York might best secure an additional supply of pure and wholesome water. 1171

The Board of Estimate and Apportionment was authorized to "adopt, modify or reject the whole or any part of" such plans, and was also authorized to "cause such additional surveys to be made, and such further information to be obtained as it should deem expedient to enable it to act intelligently in the premises." 1172

Before the adoption, modification or rejection of such plans, however, either in whole or in part, the Board of Estimate and Apportionment was required to "afford to all persons interested a reasonable opportunity to be heard respecting the same," and to "give reasonable public notice of such hearing whereat testimony may be produced by the parties appearing in such manner as the Board of Estimate and Apportionment may determine." Notice of such hearing was also required to be given to the chairman and clerk of the board of supervisors of the respective counties in which the real estate proposed to be acquired is situated at least eight days before the time named in said notice. 1173

The final map, with plan or plans approved and adopted by the Board of Estimate and Apportionment was required to be executed in quadruplicate, one copy of which should remain on file with the clerk of said board, one be placed on file in the

1174 office of the Board of Water Supply, and one, or a certified copy thereof, filed in the county clerk's office or register's office of each county in which any of the land affected is situated, and one, or a certified copy thereof, filed in the office of the Commissioner of Water Supply, Gas and Electricity.

All of the preliminary steps required by said act to be performed by the City of New York have been complied with, except so far as said application applies to the rights affected by taking the real estate in the Schoharie watershed, the City having failed to give the notice required by law by publishing it in the counties of Schenectady and Montgomery.

1175 The State Water Supply Commission, having received and filed the application of the City of New York aforesaid, caused public notice to be given in the manner required by section 3 of chapter 723 of the Laws of 1905, that it would meet at the Court House in the City of Kingston, N. Y., on the 27th day of November, 1905, at two o'clock in the afternoon of that day for the purpose of hearing all persons, municipal corporations, or other civil divisions of the State that might be affected by such application. Such notice was given by publication in newspapers, and by posting copies thereof in conspicuous places in the localities to be affected.

1176 The Commission, all of the members being present, met at the Court House in the City of Kingston, N. Y., on the 27th day of November, 1905, at two o'clock in the afternoon, as in said notice provided. The City of New York appeared by its Board of Water Supply and was represented by John J. Delany, its Corporation Counsel, and by George L. Sterling, Assistant Corporation Counsel. One hundred and twenty-six objections to the proposed plan were received and filed.

A. T. Clearwater appeared for the Ulster and Delaware Railroad Company, the Board of Trade of the City of Kingston, the Chamber of Commerce of the City of Kingston, the Cornell Steamboat Company, the First National Bank of Kingston, Samuel D. Coykendall, and for others. 1177

Everett Fowler for the towns of Ulster, Marletown, Olive, Saugerties, Hurley, Hardenburgh, Plattekill, Marlborough, Shawangunk, Shandaken, Esopus and for J. S. Whitney and others.

William D. Brinnier for Augustus Elmendorf, the Olive Telephone Company, John J. Middagh, the towns of Gardiner, Kingston, Lloyd, Rochester, New Paltz, E. O. Whitney, L. S. Schwartzwalder, and the Board of Supervisors of Ulster County. 1178

Charles F. Cantine and Agnes R. L. Sheffield, James H. Sand, Martin Cantine Company and Diamond Mills Paper Co.

M. Lackey, Jr., for the Village of Tannersville.

Bernard & Van Wagonen, for John P. Woolsey.

Milton G. Auchmoody for G. S. Stiles and Isaac Merrihew, H. C. M. Ingraham for the Ramapo Water Co.

James Jenkins for the Rip Van Winkle Creamery Co. and Oscar Herman.

John S. Devaney and Isaac N. Cox for the Town of Wawarsing.

Augustus Van Buren for the City of Kingston. 1179

J. M. Fowler for the village of Pine Hill.

Linson & Van Buren for the village of Saugerties.

C. M. Cartright for the village of Hunter.

Robert McCord for Mary L. Brantington, Herwig Hausman, Medissa Dutcher, the Town of Cortland, Westchester County, and the Board of Water Commissioners of Peekskill.

John Vanderlyn for William F. Mackay.

John G. Van Etten for Jane E. Winchell, George

- 1180 Van Wagonen, John J. Boice, the Eastern Dynamite Company, David Van Wagonen, Louis Bevier, John Van Wagonen, John H. Bush, Charles Pratt, Abram A. Vandemark, Margaret Kerr and in person. Francis C. Merritt for J. C. Douglass, Alfred Bonesteel, Lester G. Douglass, Henry Johnson, Thomas C. Johnson, W. S. Taylor and Minnie Burger.

A. Page Smith for the Hudson River Electric Power Company and the Empire State Power Company.

- Benjamin I. Tallmage for Edward M. Cole, the County of Greene, the Town of Windham and Catskill Mountain Telephone Company.

- 1181 George I. Danforth for Schoharie County and the Middleburgh Schoharie Electric Light, Heat and Power Company.

Frank H. Osborn for the towns of Catskill and Prattsville.

William D. Cunningham for Trustees of the village of Ellenville.

John R. Devaney for the Napenoch Water Company.

J. S. Frost for the residents of Preston Hollow.

Thomas A. Fulton in person.

- 1182 Frederick H. Denman for H. G. Lamont, H. C. Nash, P. L. Post and the Ramapo Water Company. W. R. Smith in person.

R. D. A. Parrott in person.

C. M. Cartright for the Trustees of the village of Hunter.

A. M. Murphy for the village of Catskill.

Betts & Betts for the towns of Jewett and Ashland.

Krum & Grant for Horace G. and Seward E. Gilman, town of Schoharie, village of Schoharie and John D. Grant.

Albert E. Bunting in person.

Francis A. Winslow for the City of Yonkers.

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Goodale & Henson for Howard L. Wheeler and nine others.

Frank H. Richmond for the Union Railway Company of the City of New York, the Yonkers Railroad Company and Henry A. Robinson.

Alexander Stolz for the Valley Farms Company of Yonkers and for John O. Farrell and Frank Green as committee.

George E. Wood for Dutchess County.

The appearances having been entered, the Commission proceeded to hear the arguments and proofs for and against the proposed application. The application was presented with much learning and ability, and vigorously opposed by lawyers of rare legal attainment. Many days were occupied in hearing the testimony and arguments and every opportunity was given to enable each interest to fully present the questions involved. The testimony is voluminous and is accompanied by maps and diagrams illustrating the location of the proposed watershed, the plan of impounding water and conducting it to the City of New York. Consideration of the questions presented and a critical study of the evidence given and arguments made, obviously required much time.

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The question of providing a sufficient supply of pure and wholesome water to meet the needs of the growing City of New York has been for many years a subject of grave concern. The report of John R. Freeman made to Bird S. Coler, comptroller of the City of New York, as early as March 23, 1900; the agreement made with the Department of Water Supply, Gas and Electricity on December 16, 1902, organizing the Burr-Hering-Freeman Commission and instructing it among other things, to ascertain and report on "The future course of supply for the

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- 1186 City, which shall be most available from the point of view of cost and quality of water, to meet the probable future conditions of the City, with the estimated cost of each, the probable yield of water from each and the length of time required to complete each, with general plans and specifications;" the studies and report of that commission submitted to Hon. Robert Grier Monroe, November 30, 1903; the studies and report of the Merchants' Association of the City of New York; the report of the National Board of Fire Underwriters of the City of New York, the discussions of the question by the Chamber of Commerce, the Manufacturers' Association of Brooklyn, the City Club, the New York Board of Trade and Transportation and other public-spirited bodies; the attention paid to this matter by the public press and on the forum and the profound interest manifested in legislation affecting the sources of the City's water supply; all these testify to its importance and interest. The value of an adequate supply of pure and wholesome water for New York City with its intimate connection with the people of every state in the nation cannot be overestimated. It is impossible to fully comprehend the disastrous results of a water famine in New York affecting as it would every home and business therein.
- 1187
- 1188 The testimony given at the hearing showing the near approach of the City of New York to a water famine in case of two or three consecutive dry years, —and the dire results which would inevitably follow such a catastrophe, demand the execution of a plan to increase without delay New York City's water supply. The evidence of the engineers of the Board of Water Supply makes it clear that, with the growing consumption of water in New York City, the present water supply is wholly inadequate to the City's future needs. This condition

subject the City to grave danger, and therefore it is the imperative duty of the City's officials to act promptly. 1189

Conscious, therefore, of the gravity of the situation which confronts New York City, of the vast amount of money involved in the stupendous enterprises suggested, and with a full appreciation of the responsibility placed upon the Commission of either granting or refusing the application of the City of New York, the Commission entered upon the discharge of its duties in the consideration of this application.

The Commission is directed by the statute to determine:

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First. Whether the plans proposed are justified by public necessity;

Second. Whether such plans are just and equitable to other municipalities and civil divisions of the State affected thereby and to the inhabitants thereof; particular consideration being given to their present and future necessities for source of water supply, and

Third. Whether said plans make fair and equitable provisions for the determination and payment of any and all damages to persons and property, both direct and indirect, which will result from the execution of said plans. 1191

To make the first determination requires consideration of the population of New York City and an estimate of the increase of its population; definite knowledge of the present sources of water supply for each of the boroughs of that city; careful study of the available yield of the proposed watershed together with the quality of its water; a just comparison of the merits in these respects claimed for other plans; and finally an estimate of the length

1192 of time necessary to put the proposed plan into operation, and the probable cost thereof.

The population of the City of New York is about 4,013,000, of which 2, 112,000 are found in the Borough of Manhattan, 271,000 in the Borough of the Bronx, 1,358,000 in the Borough of Brooklyn, 198,000 in the Borough of Queens and 72,000 in the Borough of Richmond.

The population of the City is increasing at the rate of about three per cent. per year, which under existing conditions means an annual increase in the consumption of water of about fifteen million gallons per day.

1193 The Boroughs of Manhattan and the Bronx are supplied from the water sheds of the Croton, Bronx and Bryan rivers, having a total area of 382 square miles, of which the Croton shed contributes 360 square miles. The average draft from the Croton shed was about three hundred million gallons per day in 1905, whereas the safe yield of the Croton shed in dry periods, when fully developed, is estimated at three hundred and twenty million gallons per day.

1194 Two aqueducts are available for conveying Croton water to the city, the old Croton aqueduct, with a carrying capacity of about eighty million gallons a day and the new Croton aqueduct, with a carrying capacity of about three hundred million gallons per day.

The present water supply system in the Borough of Brooklyn has been developed by appropriating, first, all available streams and ponds, and then by adding shallow and deep wells driven into the sands of Long Island. All of the water for this borough is pumped, and some of it is pumped over five times. The average daily consumption in 1905 for that borough was about one hundred and twenty million gallons. The rainfall during that year was

seven inches below the average, the borough was short of water and recourse was had to emergency plants and the purchase of water. Some of the water of this borough is so impure that it must be filtered. Such are the conditions, and in view of the legislation prohibiting the extension of the system into Suffolk County, they cause grave concern. The Boroughs of Richmond and Queens derive their supply principally from wells within their own limits and these supplies must be augmented in the near future.

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It is thus seen that all the available sources of water within easy reach of the City of New York are nearly exhausted, and each Borough is in immediate need of an additional supply.

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It has become, therefore, the duty of the City authorities to increase the City's water supply by immediately adding to the system of each borough such sources as are available, as well as by adopting a broad and comprehensive scheme, which will provide an abundant supply of pure and wholesome water for the entire City for years to come. The latter plan has been adopted by the Board of Water Supply of the City of New York, and is now before this Commission for its approval. The source of water supply in the proposed plan is the Catskill Mountain watershed, which is divided into four parts; first, the available watershed of the Esopus, which includes the Esopus River and its tributaries and contains 255 square miles; second, the available watershed of the Rondout, which includes the head waters of the Rondout River and its tributaries, consisting of 131 square miles and also three small watersheds tributary to the Rondout, having an area of 45 square miles; third, the available watersheds of the Catskill, which includes the head waters of the Catskill Creek and its tributaries and contains 163 square miles, and also six small water-

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1198 sheds tributary to the Aqueduct between Catskill Creek and the Ashokan Reservoir, having a combined area of about 82 square miles; and, fourth, the available watershed of the Schoharie, which includes the head waters of the Schoharie Creek and its tributaries and contains 228 square miles. The proposed plan provides for reservoirs in each of these watersheds, the largest being that at Ashokan with its surface about 600 feet above sea level and capable of holding one hundred and seventy billion gallons of water. This reservoir is to be connected with New York City by an aqueduct having a carrying capacity of not less than five hundred million gallons every twenty-four hours.

1199 It is estimated that these sources will afford a daily yield of at least five hundred million gallons of soft and wholesome water. The fact that the water of the Catskill Mountains is very soft is a strong argument in its favor. There is an essential difference between a soft and a hard water which appeals strongly to all who use it for domestic or manufacturing purposes. The softness of the water adds much to the comfort of those who must depend upon it, and also means a considerable annual saving in expense to them. Another strong argument in favor of the Catskill watershed is the fact that the water can be delivered by gravity to the Hillview reservoir and from there distributed under high pressure to the city without the additional cost of maintaining a pumping plant. This mountain region is not liable ever to become a manufacturing district or the center of a large resident population and is therefore peculiarly adapted for a permanent watershed.

1200 As various other sources have been suggested and claims for their consideration urged because of merit similar to that claimed for the Catskill watershed, they have been given due and careful attention.

It appears from the report of the Commission's Consulting Engineer, Mr. Myron S. Falk, that if there were no prohibitive legislation against taking water from east of the Hudson river in Dutchess county and no legislation affecting Suffolk county, and if there were no legal objections to taking a supply from the interstate waters of Ten Mile river, a supply could be developed from those sources in less time and at a less expenditure than the Catskill plan will require. 1201

Further consideration of the Dutchess county sources discloses one objection, viz: the hardness of these waters. The answer to this objection that these waters when mixed with the Croton would furnish a fairly soft resultant does not seem to justify entire reliance upon such a mixture when soft water is elsewhere available. 1202

The Suffolk county sources were referred to in the report of the Chief Engineer of the Board of Water Supply, dated October 7, 1905 as the "quickest and cheapest source of relief" for Brooklyn, and this water is of good quality. Prohibitive statutes and legal complications have, however, appeared so grave to the Board of Water Supply of the City of New York that it has not recommended the Dutchess county, Suffolk county and Ten Mile river sources, and did not include any of these sources in the plans submitted to this Commission. 1203

This Commission, nevertheless, regards the Suffolk county source as very desirable, if not necessary for the Borough of Brooklyn, and the Dutchess county source as one which may become necessary as an alleviation of difficulties which may arise. In view, therefore, of the facts that five or more years will have passed before any water from the Catskill mountain source can be turned into Croton Lake, that several years more will elapse before it will be conveyed directly to the City, that there is

1204 always present the danger of a water famine in New York until an additional supply is obtained, and that a supply from Suffolk and Dutchess counties, and from the Ten Mile river could be obtained in a much shorter period of time, the City of New York should take steps to secure the repeal of existing prohibitive legislation, and to remove the legal objections to taking the interstate waters.

That the City of New York might secure its waters from the Hudson river appears to the casual observer to be the simplest solution of its difficulties. This solution has been carefully considered by the State Commission, with the aid of the testimony, from its own observation, and from the studies of the Burr-Hering-Freeman Commission, and it finds that the Hudson river receives the sewage and drainage of a large and populous area and from river traffic, which makes it unfit for use and more or less objectionable even if filtered. This fact, together with the necessity of constructing and maintaining compensating reservoirs in the Adirondacks to keep up the river's flow and to avoid the influx of salt water in dry seasons, forces the State Commission to the conclusion that although the first cost of the Hudson river project might be less than that of the plan proposed, it is not wise for the city to acquire this contaminated supply while a pure upland supply can be obtained. In the case of a Hudson river supply, the city would be compelled to maintain and operate an expensive municipal filter and pumping plant; there appears therefore to be no good reason why the city should at this time take its additional water from a polluted and expensive source when a pure gravity supply is available.

The question of taking water from the Adirondacks and the Great Lakes has been examined, but the enormous expense involved precludes the con-

sideration of either of those sources for an immediate supply. 1207

The attention of this Commission was also called to the subject of waste by various persons who were opposed to the plan under discussion, and whose testimony tended to show that the waste of water in New York City is unnecessarily large and might, if prohibitive measures were adopted, be prevented. An investigation had been made by the Burr-Hering-Freeman Commission with a view to determining the probable amount of preventable waste. The result of the investigations called the attention of the public and of the city authorities to the need of using every possible effort to save for legitimate and proper purposes all the water brought to New York City. 1208

There were, however, two views taken of this subject. The adherents of the one claimed that if proper steps were taken, they would so relieve the conditions, that the present water supply would prove sufficient for several years, and that therefore this application should be denied, and the city authorities be required to turn their attention to preventing waste. The other view was to the effect that while there is a waste of water, as must necessarily be the case in large cities, still the amount of this preventable waste is not sufficient to justify the city in failing to proceed with all conservative haste to the execution of plans for securing an additional water supply. Adherents of this latter view believe that although every precaution should be taken and necessary legislation secured to enforce the installation of water meters, yet the use of water is bound to increase rather than diminish with the growing demands of the city. The subject of preventing unnecessary waste is one to which the city authorities should at once direct their attention. While the extent of its 1209

1210 practical effect upon the city's water supply is so uncertain, this commission does not, in view of the imperative needs of the city, regard it as a sufficient reason for denying this application.

Returning to the consideration of the Catskill watershed the cost of this plan is estimated by the Board of Water Supply to be one hundred and sixty-two millions of dollars, and it is further estimated that from five to six years must elapse before the delivery of the water can be insured from this source to the Croton basin and from eight to ten years will be required to deliver at least two hundred and fifty million gallons per day to Hill-view reservoir and one hundred million gallons per day to the Boroughs of Brooklyn and Richmond. It is admitted that this undertaking will destroy several small hamlets and a vast amount of valuable property, and that the State cannot afford to permit the City of New York to enter an interior county nearly 100 miles distant, and condemn property there, unless the conditions demand it. But if the circumstances warrant it, the State cannot afford, by refusing to permit such entrance, to retard the growth of the metropolitan city or to jeopardize the interest of its inhabitants. The City of New York should be permitted to provide for its needs, and at the same time the rights of the inhabitants of the district to be invaded should be protected.

The Commission is therefore of the opinion that the plans proposed are justified by public necessity.

Coming to the second question to be determined, viz: are the said plans "just and equitable to the other municipalities and civil divisions of the State affected thereby and to the inhabitants thereof," the Commission notes: first, that the territory from which New York proposes to take its further water supply lies west of the city of Kingston which

has a population of 25,556. There are also many thriving villages located in and adjacent to these Catskill mountain watersheds, some of which do now, while many more may in the future, require for their own use a portion of the water asked for the City of New York. The law provides that the rights, inherent to these several communities must be protected. 1213

It is also clear that the execution of the plans will interfere in some ways with the existing rights of municipalities and other civil divisions of the State situated in this locality. The application of the City of New York was silent upon the methods to be followed in meeting this question of justice to these localities, thus leaving the matter for adjustment by the State Water Supply Commission. The injustice of the plans to these municipalities and civil division of the State was pointed out and discussed by the attorneys appearing for the several municipalities. To meet these objections and to provide a plan that would be just and equitable to all of the municipalities affected, the Commission prepared amendments to sections 31, 35 and 41 of chapter 724 of the Laws of 1905, which amendments were approved by the City of New York, and the authorities of the City aided in having the act creating the Board of Water Supply of the City of New York and defining its duties amended. 1214

Those amendments provide as follows: In section 31, that no contract for construction to be performed in municipalities outside of the City of New York shall take effect until a bond in the penal sum of five thousand dollars (\$5,000) shall be given by the employer of labor to the municipality in which such labor may be employed, conditioned to save harmless and indemnify such municipality against any loss, expense or charge that it may legally incur because of pauper or indigent 1215

1216 employees brought into such municipality and having no settlement therein.

In section 35, that the City of New York shall provide proper police protection to the inhabitants of the localities in which any work may be constructed under the authority of said act, and shall also pay any evpense necessarily incurred by any county, town or city in any criminal action or proceeding against any person employed on any work constructed or in process of construction under said act, or in the suppression of riots among persons employed on said work, or in the prevention of the commission of crime by such persons, after the same has been duly audited, as required by law.

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In section 41, so as to make it lawful for any municipal corporation or other civil division of the State within the watersheds of Esopus creek, Rondout creek or the Catskill creek in the counties of Ulster and Greene, at its own expense to construct a pipe line or aqueduct connecting with any reservoir that may be constructed under the provisions of said act, in said locality, for the purpose of supplying water to such municipal corporation, or other civil division of the State the quantity of water to be drawn by such municipal corporation, or other civil division of the State, from said reservoir not to exceed the proportionate quantity that is used in the City of New York; such municipal corporation or other civil division of the State to pay to the City of New York a water tax or charge founded upon the quantity of water consumed, which rates shall be agreed upon between the parties or shall be fixed by the State Water Supply Commission after hearing all parties interested.

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The amendment to section 41 also provides that in case any water shall be taken, under the provisions of said act, from the Esopus creek in Ulster County, the City of New York, shall at its own

expense, cost and charge, and under a plan to be approved by the Common Council and City Engineer of the City of Kingston, build, construct, reconstruct, alter or change the sanitary sewers of the City of Kingston, known as the 1st and 8th Ward sewers, which now discharge into the Esopus creek, so that the same shall discharge into the Hudson river, or into the Rondout creek, the City of New York becoming liable also for any and all damages which may result from the building or construction, reconstruction, alteration or changing of said sewers, and that the City of New York shall also require, by purchase or condemnation proceedings, all rights in or over private lands in said City of Kingston, which it may be necessary to acquire in order to build, construct, reconstruct, alter or change said sewers, with the right, however, to use the public streets in the City of Kingston for such construction. 1219

The City of Kingston is now taking a portion of its water supply from the Mink Hollow stream, which is a tributary to the Esopus watershed, and included in the application of the City of New York. By a stipulation of the attorneys of the cities of Kingston and New York, entered into at the hearing, it was agreed that said application should be amended by eliminating from it this Mink Hollow watershed above the dam which diverts its water into Cooper lake. The stipulation is approved by this Commission. 1220

There are other municipalities embraced within the watersheds of the Esopus, Rondout and Catskill creeks and their tributaries which are now taking waters from said watersheds for the purpose of supplying their inhabitants with water for the usual municipal purposes, and the plans should be modified so as to protect and conserve the rights of those municipalities, as hereinafter stated. 1221

1222 The amendments of sections 31, 35 and 41 of chapter 724 of the Laws of 1905, together with the modifications of the plans as aforesaid, make said plans just and equitable to the other municipalities and civil divisions of the State affected thereby.

The third requirement of the statute still remains for consideration, to wit: "Do said plans make fair and equitable provision for the determination and payment of any and all damages to persons and property, both direct and indirect, which will result from the execution of said plans?"

1223 The plans contemplate building a large storage dam at Ashokan on the Esopus river, with a flow line 600 feet above tide-water and high enough above the surface of the ground at that point to flood the entire Esopus Valley from mountain to mountain, backing up the water for a distance of about 17 miles, submerging 10,120 acres and covering all of the villages and farm lands lying within this territory, and destroying or causing the removal of all houses, business places, schools, churches, cemeteries, railway stations and activities within such area. Here are established permanent homes, business places and market centers where employment is afforded to many people. All of this is to be broken up and the territory turned into one great impounding reservoir. The plans

1224 also contemplate the construction of many smaller reservoirs which will impound the waters of the other mountain streams, in some cases destroying villages and in many instances damaging business and property, both directly and indirectly, by abolishing markets, by destroying business opportunities, by decreasing the value of homes and farms and by depriving laborers of fixed and regular employment; in short by arresting all development of these localities.

All of these changes mean a readjustment of con-

ditions in these communities. To protect such interests was the purpose of the third requirement of the statute. 1225

This condition was the subject of such serious discussion at the hearing and the injustice it involved was forcibly urged by those filing objections to the plans of the City of New York. In rebuttal the City, in an elaborate paper by the Assistant Corporation Counsel, explained its plan and claimed that the scheme was just and equitable in every particular.

The Commission is convinced that the City's plan was neither broad nor specific enough to meet the requirements of the statute or to justify the City in so materially affecting the communities to be invaded. 1226

Although given by the statute power to modify any plan so as to protect the people affected, this Commission became convinced that justice could be done to all parties by further amending chapter 724 of the Laws of 1905, and it therefore prepared a series of amendments which it believes fully protects the interests of the people that may be affected by the execution of the plans of the City of New York, yet works no hardship to that city. These amendments were approved by the City of New York, and are now a part of the statutory law of the State. 1227

They provide as follows:

Section 11 of chapter 724 of the Laws of 1905 as amended in 1906, provides that before the City of New York takes possession of any of the lands necessary for the execution of its plans, it shall pay to the respective owner or owners of each parcel of real estate taken, a sum of money equal to one-half of the assessed valuation of same, as it appears by the assessment roll of the town in which

1228 the same is situate for the year 1905, and provides, that a deposit of the money to the credit of, or payable to the owner of such land, pursuant to the direction of the Court, shall be deemed a payment thereon.

Section 37 of said act as amended provides that if the City of New York, or its representatives shall enter upon any lands not taken in pursuance of said act, for the purpose of preserving streams or water courses from pollution or contamination, or for the purpose of removing or causing to be removed, any buildings or improvements thereon, on the ground that the same may contaminate the water supply, 1229 it shall make just compensation to the owner of said buildings or improvements.

Section 42 of said act as amended provides that if any real estate, not taken by virtue of that act and chapter 723 of the Laws of 1905, or if any established business on the 1st day of June, 1905, situate in the counties of Ulster, Albany or Greene, should be, directly or indirectly, decreased in value by reason of the acquiring of lands by the City of New York, under the provisions of said act and chapter 723 of the Laws of 1905, the owner, his heirs, assigns or personal representatives, shall have a right to damages for such decrease in value, and that the Commissioners, appointed to determine such damages, shall not be limited in the reception of evidence to the rules regulating the proof of direct damages. It also provides that a person employed in a manufacturing establishment or in an established business, or upon any lands who is not the owner thereof, or of any interest therein, in the counties of Ulster, Albany and Greene, which manufacturing establishment or established business is injured or destroyed, or which lands are taken or acquired under or because of the provisions of said act, who has been so employed 1230

continuously for six months prior to the 1st day of January, 1906, and who continues in such employment up to the time of such injury, destruction, taking or acquisition, shall have a claim for damages against the City of New York equal to the salary paid such employee for the six months immediately preceding the 1st day of January, 1906, and that an action to recover such damages, if they cannot be agreed upon, may be maintained against the City of New York in the Supreme Court, not, however, for an amount to exceed the sum of the wages paid the party claiming such damages for the six months immediately prior to the 1st day of January, 1906.

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The amendments were prepared after consideration of the evidence produced, and the arguments made by the attorneys representing the objectors upon the hearing; also after a personal inspection of some of the territory proposed to be taken and a study of the laws of the State of Massachusetts, and the method adopted by the Metropolitan Water Board of that State in dealing with similar questions; and the Commission believes that the law as now amended makes fair and equitable provisions for the determination and payment of any and all damages, both direct and indirect, which may result from the execution of said plans, and that it also protects New York from paying exorbitant and improper damage.

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The Committee, therefore, finds and determines:

First. That the application of the City of New York and the plans submitted for a new and additional supply of water, are justified by public necessity.

Second. That the said plans be and the same hereby are modified as follows:

The said City of New York is hereby prohibited

- 1234 from taking any of the waters of the so-called Mink Hollow stream above the dam constructed thereon by the City of Kingston to divert said waters into Cooper Lake, and that any Municipal Corporation or other civil division of the State within the watersheds of the Esopus, Rondout or Catskill creeks, may at any time take water from any reservoir or aqueduct to be constructed under said plans, upon paying to the City of New York a water tax or charge founded upon the quantity of water consumed, which tax or charge may be agreed between the parties or shall be fixed by the State Water Supply Commission after hearing all the parties interested. And any of such municipal corporations or other civil divisions of the State may take water from said creeks and from other sources in said watersheds, as they may need from time to time for the usual purposes of a municipal water supply; and it is further modified by striking out from the said application and the maps, profiles and surveys accompanying the same, the Schoharie watershed, and the said City of New York is prohibited from taking any of the waters of the Schoharie watershed; without passing upon the meters, for the reasons hereinbefore stated, viz.: the failure of the city to give the public notice required by the statute in the counties of Montgomery and
- 1235
- 1236 Schenectady.

That said plans as above modified, taken with the amendments made to sections 31, 35 and 41 of chapter 724 of the Laws of 1905, by chapter 314 of the Laws of 1906, are just and equitable to other municipalities and other civil divisions of the State affected thereby and to the inhabitants thereof, particular consideration being given to their present and future necessities for sources of water supply.

Third. That said plans taken with the amend-

ments to sections 11, 37 and 42 of chapter 724 of the Laws of 1905, by chapter 314 of the Laws of 1906, make fair and equitable provisions for the determination and payment of any and all damages to persons and property both direct or indirect, which will result from the execution of said plans. 1237

The State Water Supply Commission does hereby approve the said application of the City of New York with the modifications in the said plans submitted as hereinbefore stated and set forth, and which modifications it deems necessary to protect the water supply and the interests of the municipal corporations and civil divisions of the State, and the inhabitants thereof affected thereby. 1238

In witness whereof, said State Water Supply Commission has hereby made the foregoing decision in writing, has signed the same and caused its official seal to be hereunto affixed, and the same, together with all plans, maps, surveys and other papers or records relating thereto with the testimony taken by it, filed in its office in the City of Albany, this 14th day of May, 1906.

HENRY H. PARSONS,
President.

MILO M. ACKER,
ERNEST J. LEDERLE,
JOHN A. GLEICHER,
CHARLES DAVIS,
Commissioners.

(L. S.)

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APPENDIX NO. 2.

PARCEL No. 264.

"The records of contracts made to purchase land by the Ramapo Water Company, referred to above, was received in evidence by the Commission and marked, "Claimant's Exhibit— "of this date, and reads as follows:

Benjamin Van Steenburgh, Town of Olive, Ulster County, March 28th, 1899, 10 acres, \$3,000.

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Jesse V. Boice, Olive Bridge, Ulster County, March 31, 1899, four acres, five acres, \$15,600.

Howard Barton, Olive Bridge, Ulster County, March 29th, 1899, four acres, \$1,000.

Isaac L. Merrihew, Olive Bridge, Ulster County, March 29th, 1899, forty acres, \$10,000.

William Haver and Elizabeth Haver, Olive Bridge, Ulster County, March 30th, 1899, two acres, \$4,000.

Ephraim M. Bishop, Olive Bridge, Ulster County, March 29th, 1899, five acres, \$1,300.

Jacob W. Beesmer, Olive Bridge, Ulster County, March 30th, 1899, six acres, \$3,000.

Hugh Locke, Olive Bridge, Ulster County, March 30th, 1899, 22 acres, \$6,000.

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Herman Baryon, Jr., Olive Bridge, Ulster County, March 29th, 1899, five acres, \$2,000.

Asa Bishop, Olive Bridge, Ulster County, March 29th, 1899, one acre, \$1,000.

Charles C. Winne and Elizabeth E. Winne, Olive Bridge, Ulster County, March 30th, 1899, one-quarter acre, \$2,000.

Emma Winchell, Cold Brook, Ulster County, March 31st, 1899, two acres, \$1,200.

Elizabeth A. Winne, Cold Brook, Ulster County, March 31st, 1899, 60 acres, \$8,000.

Davis Maine, Cold Brook, Ulster County, March 31st, 1899, 14 acres, \$1,400. 1243

David Winne, Cold Brook, Ulster County, March 31st, 1899, 900 acres, \$6,000.

William C. Winne, Cold Brook, Ulster County, March 31st, 1899, 15 acres, \$3,500.

Charles C. Krom, Shokan, Ulster County, March 31st, 1899, 100 acres, \$6,000.

William D. Every, Shokan, Ulster County, March 30th, 1899, 15 acres, \$1,000.

Henry Boice, Shokan, Ulster County, March 31st, 1899, 75 acres, \$3,000.

Mary L. Cole, Shokan, Ulster County, March 30th, 1899, 112 acres, \$4,500.

1244

Richard Donohue, Shandaken, Ulster County, April 1st, 1899, 363 acres, \$11,000.

Gilbert Beckworth, Shandaken, Ulster County, April 1st, 1899, 75 acres, \$1,500.

Ira Elmendorf, Town of Olive, Ulster County, April 3rd, 1899, 1¼ acres, \$5,000.

Constantine Bloss, Town of Olive, Ulster County, April 3rd, 1899, one acre, \$1,800.

D. M. Matthews, Town of Olive, Ulster County, March 31st, 1899, eight acres, \$1,600.

Jacob A. Delamater, Town of Olive, Ulster County, April 1st, 1899, five acres, \$3,500.

John E. Nicholls, Town of Olive, Ulster County, April 1st, 1899, one acre, \$1,000. 1245

Caro Olive, Broadhead Bridge, Ulster County, April 3rd, 1899, three acres, \$750.

V. R. Merrihew, Broadhead Bridge, Ulster County, April 3rd, 1899, one-quarter acre, \$1,000.

Frances Eckert, Town of Olive, Ulster County, April 7th, 1899, 350 acres, \$2,500.

Aaron Every, Town of Olive, Ulster County, April 7th, 1899, 150 acres, \$1,500.

Jacob Eckert, Town of Olive, Ulster County, April 7th, 1899, 20 acres, \$800.

1246 Rebecca N. Eckert, Town of Olive, Ulster County, April 7th, 1899, 60 acres, \$600.

Jacob Eckert, Town of Olive, Ulster County, April 7th, 1899, 150 acres, \$250.

Jacob Eckert, Town of Olive, Ulster County, April 7th, 1899, 50 acres, \$500.

Eugene B. Kerr, Town of Olive, Ulster County, April 7th, 1899, 64 acres, \$1,200.

Nathan Eckert, Town of Olive, Ulster County, April 7th, 1899, two acres, \$700.

Daniel Every, Town of Olive, Ulster County, April 10th, 1899, 61 acres, \$4,000.

1247 Garrison Davis, Town of Olive, Ulster County, April 7th, 1899, 110 acres, \$3,000.

John Harlin Eckert, Town of Olive, Ulster County, April 7th, 1899, 171½ acres, \$500.

Isaac Short, Woodstock, Ulster County, April 6th, 1899, 430 acres, \$3,000.

William Short, Woodstock, Ulster County, April 6th, 1899, 435 acres, \$5,000.

Frederick Happy, Woodstock, Ulster County, April 6th, 1899, 1,000 acres, \$8,000.

Oliver Davis, Shokan, Ulster County, April 4th, 1899, three acres, \$1,200.

Daniel Coons, Bushnellville, Greene County, April 8th, 1899, 60 acres, \$1,500.

1248 Anna E. Schillat, Lake Hill, Greene County, April 7th, 1899, 63 acres, \$500.

Albert G. Loomis, Deposit, Greene County, November 26th, 1899, five acres, \$100.

William B. Davis, Town of Olive, Ulster County, December 3rd, 1898, five acres, \$700.

Cyrus Montansy, Esperance, Schoharie County, November 1st, 1898, 58 acres, \$300.

Emory Van Wagner, Woodstock, Ulster County, March 11th, 1899, 80 acres, \$300.

J. H. Simpson, Shandaken, Ulster County, December 14th, 1898, five acres, \$500.

R. S. Woy, C. G. Woy and Mary W. Woy, Shandaken, Ulster County, November 2nd, 1898, 1249
acres, \$400.

Mary A. Flynn, Shandaken, Ulster County, October 26th, 1899, 281 acres, \$4,000.

John R. Evans, Shandaken, Ulster County, December 5th, 1898, five acres, \$500.

Frances A. Brinnier, Shandaken, Ulster County, October 24th, 1898, 10 acres, \$500.

John Miller, Wawarsing, Ulster County.

Cornelia A. Bishop, Town of Olive, Ulster County, October 14th, 1898, seven acres, \$2,500.

Joseph E. Hill, Town of Olive, Ulster County, October 22nd, 1898, 30 acres, \$2,500.

William V. E. Boice, Town of Olive, Ulster County, December 3rd, 1898, 26 acres, \$1,600.

Libby Burton, Town of Olive, Ulster County, March 24th, 1899, 45 acres, \$1,000.

Darius W. Hover, Town of Olive, Ulster County, March 24th, 1899, 26 acres, \$8,000.

Norman W. Barton, Town of Olive, Ulster County, March 24th, 1899, 30 acres, \$3,000.

Henry Snyder, Town of Olive, Ulster County, March 24th, 1899, 110 acres, \$5,000.

John Every, Town of Olive, Ulster County, March 24th, 1899, 100 acres, \$4,000.

John Raney, Town of Olive, Ulster County, March 24th, 1899, 50 acres, \$4,000.

John I. Boice, Town of Olive, Ulster County, March 24th, 1899, 55 acres, \$4,200.

Zachariah Palen, Town of Olive, Ulster County, March 24th, 1899, 121 acres, \$4,000.

Josiah H. Hasbrouck, Cold Brook, Ulster County, March 25th, 1899, 64 acres, \$3,000.

Hannah Hubbard, Cold Brook, Ulster County, March 25th, 1899, 150 acres, \$3,000.

Jerome Winne, Cold Brook, Ulster County, March 25th, 1899, 185 acres, \$1,000.

1250

1251

1252 Josiah L. Hasbrouck, Cold Brook, Ulster County, March 25th, 1899, 41½ acres, \$2,000.

Millard H. Davis, Boiceville, Ulster County, March 25th, 1899, 75 acres, \$75.

Millard H. Davis, Boiceville, Ulster County, March 25th, 1899, 50 acres, \$250.

Millard H. Davis, Boiceville, Ulster County, March 25th, 1899, 110 acres, \$5,000.

Z. P. Boice, Shokan, Ulster County, March 25th, 1899, 220 acres, \$400.

Z. P. Boice, Shokan, Ulster County, March 25th, 1899, 175 acres, \$350.

1253 Mary A. Weeks, Town of Olive, Ulster County, April 11th, 1899, 21 acres, \$2,500.

Mary A. Short, Verona, Oneida County, April 10th, 1899, 56 acres, \$1,200.

George Silkworth, Town of Olive, Ulster County, April 14th, 1899, 56½ acres, \$6,000.

Elias D. Eighmey, Woodstock, Ulster County, April 13th, 1899, 76 acres, \$4,000.

John H. Martin, Woodstock, Ulster County, April 13th, 1899, 80 acres, \$5,000.

Mahala Waters, Woodstock, Ulster County, April 13th, 1899, 140 acres, \$6,500.

Frank R. Martin, Woodstock, Ulster County, April 13th, 1899, five acres, \$5,000.

1254 Emory Van Wagner, Woodstock, Ulster County, April 13th, 1899, 32 acres, \$1,200.

John Duncan, Cairo, Greene County, February 27th, 1899, 125 acres, \$5,000.

Total contract, 84; total acres, 7,472¼; total amount, \$241,575.

APPENDIX NO. 3.

1255

The said proceedings of the Common Council of the City of Kingston and its Committees referred to in this connection are received in evidence by the Commission, but not marked, and read as follows:

'Copy of proceedings of the Common Council and its Committees Relative to Source of Water Supply from Bishop's Falls.

'On February 3rd, 1893, Alderman Brinnier offered the following resolution:

'Resolved, That a committee consisting of Aldermen Pitts, Hamburger and Rafferty be and are hereby appointed to examine and report to the Common Council as to the advisability of this city's building a water works of its own, and report where they can obtain the best supply of pure water, etc., and probable cost thereof.

1256

'The resolution was adopted. On motion of Alderman Rafferty, Alderman Brinnier was added to the committee.

'On June 30, 1893:

'On motion of Alderman Hamburger, the City Engineer was directed to take levels from Bishop's Falls on the Esopus Creek to the City.

1257

'Friday evening, August 4, 1895:

'On action of Alderman Hamburger, the rules were suspended in order to hear the report of a special committee on a new water supply to be obtained from Bishop's Falls.

'The report was read by the City Engineer. Alderman Breitenbucher moved that the report be received and adopted, which was carried by the following vote:

1258 'Ayes: Aldermen Pitts, Addis, Crosby, Steinert, Goodsell, Breitenbucher, Rafferty, Halloran, Costello, Beck, Winter, Wieber, Hamburger, Thompson and Purvis—15.

'Noes: Alderman Pettit—1.

'Alderman Hamburger moved that the committee on printing have 3,000 copies of their report printed in pamphlet form for distribution among the taxpayers of this city, so that they may have a 'clear understanding of the question when the same is submitted to a vote of the taxpayers. Carried.

August 11, 1893:

1259 'On motion of Alderman Hamburger, the rules were suspended in order to hear the supplementary report of then special committee on new water supply.

'On motion of Alderman Rafferty, the report was received and adopted, and ordered to be printed with the report formerly submitted and adopted.

'The report and supplementary report, as filed follows:

'To the Mayor and Common Council of the City of Kingston:

'Gentlemen:

1260 'Your Committee on New Water Supply, appointed by resolution, passed February 3, 1893, hereby have the honor to present the following report:

'On the 4th of April, the Committee met and organized, choosing Mr. Hamburger as chairman and Mr. Pitts as secretary. The whole matter of water supply was talked over and it was determined, if possible, to find a location for a reservoir by which the city could be supplied by gravity. As the streams at that time were still covered by ice, and the snow still lay on the ground, it was thought best not to attempt to make any more effort to look

up a site for a reservoir then, but to wait till the spring freshets had passed, and it was proposed not to make any further move till some time in July, about which time the streams in our vicinity would be at their lowest point. 1261

'On the 29th day of June the Committee, accompanied by the City Engineer, proceeded to examine the locations for a reservoir, and the Esopus Creek, Bishop's Falls, Winchell's Falls, and the Cathedral Gorge were visited. Your Committee was most favorably impressed with the natural advantages for the construction of a dam at either of these points. The bottom and side of the creek is 'in each case, rock, with apparently few seams, and a dam could be built at either point at comparatively low cost. 1262

'At the Common Council meeting of June 30, the Chairman made a progress report and moved that the City Engineer be requested to obtain the elevation above tidewater of the points examined, and to report the same to the Committee, together with an approximate estimate of the cost of the work. The levels were run on July 5th, and a report was submitted to the Committee by the City Engineer on July 11. (For which report see Appendix A.) In accordance with one of the recommendations of said report, said sub-committee, consisting of the Chairman, with the City Engineer, was directed to proceed to Bishop's Falls and Winchell's Falls and obtain samples of water for analysis, and also to procure a supply of water from the present private system for comparison. This the sub-committee did on July 13. They procured three new five-gallon glass demijohns, which were carefully scalded out and filled, No. 1 at Bishop's Falls, No. 2 at Winchell's Falls and No. 3 at the tap in the store of Alderman Pitts. Each of these demijohns, immediately upon being filled, was corked, sealed up and marked by its number in paint. They were sent, on July 1263

1264 14 to Mr. Lewis Beach, secretary of the State Board of Health, Albany, N. Y., with a request that he submit them to some competent chemist for analysis, which request he complied with by sending the samples to the State Laboratory of Professor Willis G. Tucker, who made the analysis and reported (see Appendix B, under date of July 22). The committee met and received the report July 25, at which meeting Mr. H. H. Pitts was made a sub-committee to draw up a report and submit the same to the full committee on August 1. (All correspondence, reports, etc., are to be found in the appendix.)

1265 'First your committee find, from the report of the engineer, that the elevation of the water level at the top of Bishop's Falls is 423 feet above tide-water, or 243 feet above the general level of the upper portion of the city, and 72 feet higher than the top of the Sawkill dam. Winchell's Falls is 363 feet above the high water, 180 feet above the general level of the upper part of the City, and nine feet above the Sawkill dam.

1266 'As the Beaverkill empties into the Esopus Creek, between Bishop's Falls and Winchell's Falls, your committee did not suppose that the water from the last named place could be as good as that taken from the higher level. The supposition of the committee was verified by the analysis and report of Professor Willis B. Tucker, who, not knowing from what place the water sent in was taken, reports No. 1, or the Bishop's Falls sample, to be the best of the three, and No. 3, or the water taken from the Kingston Water Company's Works, to be the least satisfactory.

'At the time these samples were taken, the Esopus Creek was said by people living in that vicinity to be about as low as it ever got.

'The water can never be any worse than the sam-

ples sent to Professor Tucker, and the committee congratulates themselves and the Common Council that so good a site for reservoir, with an abundance of water, is obtainable. Your committee further find, in case it is deemed necessary, a distributing reservoir can be built in the Kuyhoudt or Golden Hill, about the same height as the present Sawkill reservoir. 1267

'They also find that with a proper system of piping, water can be furnished to all parts of the city.

'They further believe that the suggestion of the City Engineer as to the method of arranging the tax for the water supply is a good one, and recommend its adoption. This method, if it is adopted, will give a gross income of, say, \$42,000, less interest, \$2,100; less maintenance \$10,000—\$31,000; extensions and repairs, leaving to go to sinking fund, \$11,000; to which can be added amount now paid to the water company for hydrants, \$10,000; making a total contribution to sinking fund, \$21,000. 1268

'This shows that if an amount as large as \$600,000 is needed for the construction of water works, the city can issue water bonds to that amount, and the taxpayers, by paying less money as water taxes to the city than they pay as water rates to the Kingston Water Company, will, at the end of thirty years, own their own works. 1269

'After that, the City will derive an income from their works, estimated to be at least, after paying the necessary charges for repairs, maintenance and expenses, of \$40,000 per annum.

'We have used the amount of \$600,000 as the largest probable cost of works that will supply the whole city with an abundant supply of good water. It is probable that a smaller amount will suffice, but extended surveys will be necessary to determine this.

1270 'Any reduction of this amount will be to the city's gain.

'Your committee, therefore, recommend that the question of constructing and maintaining water works will be submitted to the taxpayers of the City of Kingston at an early date.

'To the end that if the said proposition is carried further, steps may be taken to ascertain more closely the cost of said works, and

'That at the next meeting of the Legislature of the State of New York, such further legislation as may be needed be asked for.

1271 URBAN HAMBURGER, Chairman.
WILLIAM F. RAFFERTY,
WILLIAM D. BRINNIER,
H. H. PITTS.'

Mr. Chairman and Gentlemen:

'Under your orders, I made a partial reconnoissance and survey of the proposed site for a reservoir on the Esopus Creek, and herewith report to you the results of the said survey.

1272 Three places were found on the Esopus Creek, which it was thought might prove adequate for the purpose of a reservoir, namely, the Cathedral Gorge, Winchell's Falls, and Bishop's Falls. These points are from 10 to 11½ miles from the city.

'At either of these points a most excellent foundation can be obtained for a dam, the bottom of the creek being solid rock.

'In order to ascertain the elevation of these points, above high water, I ran a line of levels to Winchell's Falls and to Bishop's Falls, taking the elevation of the Ulster & Delaware Railroad, as shown on the railroad profiles, at Brown's Station, as my initial point, and find that the elevation of the top of the present dam at Winchell's Falls is

360 feet above high water in the Hudson River, and the elevation of the water above the dam at Bishop's Falls is 430 feet above high water. The elevation of the Cathedral Gorge I did not take, but estimate the same to be about 325 feet above high water. 1273

The elevation of the Sawkill dam is nine feet and Bishop's Falls is 72 feet above the Sawkill Reservoir.

Winchell's Falls and the Cathedral Gorge are both below the entrance of the Beaver Kill in the Esopus Creek, Bishop's Falls being above said stream.

We would have for Bishop's Falls a drainage of approximately 300 square miles, and by the use of the proper size of pipe and a proper system of distributing there would be no difficulty in giving all parts of the City a full supply of water for domestic, manufacturing and fire purposes. Of the quantity of water supply, there can be no question, and the quality appears to be good. I would, however, recommend that an analysis of the water taken from a point above Bishop's Falls be made in order that you may be assured of its purity. I would estimate the length of the main pipe to be in the neighborhood of $11\frac{1}{2}$ miles, and that thirty miles of laterals would be required at once. Probably a main of thirty inches in diameter would be needed. 1274

I would estimate the cost of said plant to be about \$550,000. 1275

In order to find out if the city would be justified in going to this expense to procure its own water, I make an approximate estimate of revenue, using as a basis the lineal feet front of all property abutting the water pipes. Where no water pipes are laid, no tax should be placed upon the property, and in all cases where pipes are laid in the streets,

1276 so that the adjoining owners can have the use of the same, they should pay the tax. For the purpose of this estimate, I assume a tax of 20 cents per lineal foot for improved property and a tax of ten cents per lineal foot for improved lots, per annum.

‘Assuming we lay thirty miles of pipes, we would have 158,400 feet of pipes and 316,000 feet of abutting property. Assume that twenty per cent of this is street crossings, we would still have 253,440 lineal front feet of property, liable to tax. Assume one-third of this to be vacant lots (or 84,480 feet), and we have (168,960 lineal feet of improved property) now 84,480 feet of vacant lots, at ten cents per foot, \$8,448; 168,960 feet of improved property, at 20 cents per foot, \$33,972; which gives a total revenue of \$42,240.

‘The amount of \$550,000, which we assume to be the total cost of the works, can be borrowed at four per cent. interest, which would amount to \$22,000. per annum, leaving \$20,240 per annum for expenses of operation and for a sinking fund to pay the borrowed capital.

‘Besides, in the above we have not taken into account the sum paid at the present time for hydrant service, which amounts to nearly \$10,000 per year.

1278 ‘On an ordinary house lot, with 50 feet front, if there is hot or cold water in the kitchen, and a bathroom, a tub, water closet and bowl, the rate is \$17 a year. Under the above system of revenue, the householder would pay but \$10.

‘Respectfully submitted,

EDWARD B. CODWISE,
City Engineer.”

Kingston, July 11, 1893. 1279

'Analysis of Kingston Waters, Willis G. Tucker,
Ph.D.

(Results, parts per 100,000 unless otherwise stated)

Source	Not stated.	Not stated.	Not stated.
Date rec'd	July 17.	July 17.	July 17.
	1893.	1893.	1893.
Color and appearance.			Very slightly Tinted
Number of sample	No. 1.	No. 2.	No. 3.
	Transpar- ent, very.	Transpar- ent, very.	Light yellow-
	Light green- ish tint.	Light green- ish tint.	ish green tint. Some
	Slight sediment.	Trifling sediment.	brownish sediment.
Taste.	None	None	None
Odor at 100 deg. Fr'h't.	"	"	Very slight
Chlorine in Chlo- rides.	0.25	0.20	0.25
Equivalent to So- dium Chloride.	0.41	0.33	0.41
Free ammonia.	0.0020	0.0040	0.0005
Albumenoid Am- monia.	0.0050	0.0105	0.0073
Total Ammonias.	0.0070	0.0145	0.0083
Nitrates.	None	None	None
Nitrogen in Ni- trates.	0.008	0.005	0.015
Oxygen absorbed (Kubel).	0.1090	0.1390	0.1565
Phosphates.	None	None	None
Total hardness.	0.95	0.95	0.95
Equivalent to grains	0.55	0.55	0.65
Carb. lime in U. S. Gal.			

1280

1281

1282	Permanent hardness	0.95	0.95	1.11
	Total solids.	3.60	3.60	4.40
	Equivalent to grains per U. S. Gal.	2.21	2.10	2.56
	Appearance of Residue.	Colorless	Colorless	Colorless
	Loss on ignition	1.40	1.20	1.40
	Behavior during ignition.	No Blackening	Slight Darkening	Slight Darkening
	Mineral matter.	2.40	2.40	3.00

'Albany, N. Y., July 22, 1893.

1283 'Edward B. Codwise, Esq.,
'City Engineer,
'Kingston, N. Y.

'Sir.—On the 17th inst. I received from you three samples of water said to have been procured by a committee of the Common Council of your city on new water supply, with the request that I should analyze the same and report to you the results of the examination, together with an opinion as to the most preferable for public use. The samples were taken on or about July 14, and were contained in large demijohns which reached me in good condition, numbered 1, 2 and 3. The analysis of the samples was immediately begun, and I herewith transmit the following report upon the same:

1284 'I deem it unnecessary to enter upon any detailed description of the processes employed in making the analysis, since they were, in the main, those generally followed in water analysis. The color and clearness was determined by viewing the water in a two-foot tube and the odor was noted at 100 degrees Fahrenheit. Chlorine was determined volumetrically with silver nitrate, using potassium chromate as an indicator. In the ammonia de-

termination, the 100 cubic centimeter process of one Wanklyn was employed, with such modifications as experience has shown to be necessary. Griess' test was employed for nitrates and for nitrogen in nitrates the phenolsulphonic acids process of Grandval and Lajouz was used. Oxygen absorbed was determined by Kubel's method, the water being boiled with permanganate solution for ten minutes. Hardness was determined by titration with soap solution in the usual manner, and total solids by evaporation of 100 cubic centimeters of the water in a platinum dish, the appearance of the residue being noted. Loss on ignition was determined by heating the residue to low redness, and any darkening occurring during the operation was noted. Especial care was taken that all determinations of the same kind should be made in precisely the same manner, for, while similar methods in water analysis may, in different hands, yield slightly different results, and while some of the processes, though the best possessed by chemists at the present time, do not yield results having the highest absolute value, yet the results obtained by these processes do have a high degree of value for purposes of comparison if they are acquired by the same operation, at the same time and as nearly as possible in the same manner.

'It is not thought to be necessary in this report to discuss the significance, from a sanitary standpoint, of the various natural constituents of the waters, or products or decomposition taking place there, which were determined in these analysis since they have been often explained and are now pretty generally understood. The results of the analysis are appended to this report in tabular form, and from these results the following conclusions may be drawn: Nos. 1 and 2 are transparent, as seen in a two-foot

1288 tube, have very little color and yield but a trifling sediment, while No. 3 has a more decided color, a very slight turbidity and yields a more decided sediment. All are free from any disagreeable taste, and No. 3 alone has any trace of disagreeable odor. Chlorine often indicates a sewage contamination, is low in all, and all are free from nitrates and phosphates. Nitrogen intrate is very low in all of the samples, but is lowest in Nos. 1 and 2. Free and albumenoid ammonia are satisfactorily low in all, with total ammonias lowest in No. 1; oxygen absorbed is also satisfactorily low in all, but is lowest in No. 1 and highest in No. 3.

1289 The waters are all exceedingly soft, both before and after boiling, with total solids low in all. The residue left on the evaporation of Nos. 2 and 3 darkens slightly on ignition.

1290 From the above it will be seen that all the waters are good or very fairly good quality for domestic use and manufacturing purposes, as judged by our commonly accepted standards and as compared with surface waters supplied to most American cities. The physical properties of Nos. 1 and 2 are better than those of No. 3, which has more color and turbidity, and yields a large sediment, besides possessing a slight disagreeable color. Chemically, the differences are not very decided, but on a careful consideration of the analytical results, I am of opinion that No. 1 is the best and No. 3 the least satisfactory of the samples. It is proper for me to say that, as I have no knowledge of the source of these samples, nor of their surroundings nor of any of the conditions which may affect these waters, I am obliged to base my opinion upon the chemical findings alone. Other considerations might affect this opinion, especially in a case like this, in which the difference between the

waters are from the chemical standpoint, not great, and the chemist is best able to advise in such cases when he is in possession of all knowledge which may, in any way, be obtained concerning the water submitted to him, its source, surroundings of same, and the various conditions which may effect it at different times or under different conditions. 1291

Yours very respectfully,

WILLIS G. TUCKER, Ph. D.

'Gentlemen :

'In reply to your inquiry, I submit the following: 1292

'1. Upon a proposition for an additional tax, only taxpayers on real estate whose names appear on the roll can vote. Sec. 70, City Charter.

'2. The City Clerk shall give at least ten days' notice by publication in the newspapers and by posting same in the several wards of the vote, a meeting for that purpose. Section 70, City Charter.

'I beg further to inform you that if it be the purpose of your committee to recommend action regarding water supply, that you should not omit to recommend the securing of suitable legislation. The Charter gives the Council no power to condemn the necessary lands for water works, nor does it, indeed, authorize the construction and maintenance of a plant to supply water to itself and its inhabitants by it. 1293

Yours very truly,

G. D. B. HASBROUCK.

1294

'Kingston, N. Y., July 14, 1893.

'LOUIS BALCH, Esq.,
'Secretary, State Board of Health,
'Albany, N. Y.

'Sir: The Common Council of the City of Kingston, having appointed a special committee on 'New Water Supply,' and said special committee having procured three samples of water, hereby request that you have an analysis of the said samples made, and forward report of the same to the City Engineer, together with an opinion as to the most preferable sample for public use. Packages containing these samples, numbered 1, 2 and 3, are this day sent to you by Am. Ex. charges paid. For any expenses attached to this analysis, please forward bill with report.

1295

Very respectfully yours,

U. HAMBURGER, Chairman.
H. H. PITTS, Clerk.
EDWARD B. CODWISE, City Eng.

'State Board of Health of New York.
'Albany, July 17, 1893.

1296

'To EDWARD B. CODWISE, Esq.,
'City Engineer,
'P. O. Box 939,
'Kingston, Ulster Co., N. Y.

'Sir: I am in receipt of your letter of the 14th inst., stating that you had sent us three samples of water by express to this Department for analysis.

'The water arrived safely this morning. I have sent them to the State Laboratory and requested Prof. Willis G. Tucker to make the analysis and forward reports thereof to you, and to enclose his

bill for the work. His address is State Laboratory, 1297
Albany Medical College, N. Y.

Very respectfully,
Your obedient servant,

LOUIS BALCH, Secretary.

'Kingston, N. Y., July 18, 1893.

'MR. LEWIS BALCH,
'Sect., State Board of Health,
'Albany, N. Y.

'Sir: Your letter of yesterday, stating that you
had received our samples of water, and had turned
the same over to Prof. Willis G. Tucker for anal- 1298
ysis, received. The Committee request me to extend
their thanks to you for your courtesy.

Very respectfully,
Your obedient servant,

EDWARD B. CODWISE,
City Engineer.

'Kingston, N. Y., July 19, 1893.

'Prof. WILLIS G. TUCKER,
'State Laboratory, Albany Medical College,
'Albany, N. Y.

'Sir: Mr. Louis Balch, Secretary State Board 1299
of Health, writes me that he has turned over to you
samples of water sent by the committee on New
Water Supply for test. For the information of the
Committee, would you have the kindness to inform
me approximately when the test will be completed
and when we may look for your report.

'Very respectfully,
'Your obedient servant,

EDWARD B. CODWISE, CITY ENG.

1300

'Albany Medical College,
'Albany, N. Y., July 20, 1893.

'EDWARD B. CODWISE, Esq.,
'City Engineer,
'Kingston, N. Y.

'Dear Sir: In reply to yours of the 19th inst., would say that the samples of water, three in number, were duly received from L. Balch and the analysis of the same was immediately begun. I hope to be able to report upon them by Saturday of this week.

'Yours respectfully,

1301

'WILLIS G. TUCKER.'

'State of New York,
'County of Ulster,
'City of Kingston.

'I, John T. Cummings, City Clerk of the City of Kingston, do hereby certify that I have compared the preceding transcript of Proceedings of Common Council and its Committee Relative to Source of Water Supply from Bishop's Falls, with the originals on record in the office of the City Clerk of the City of Kingston, and that the same is a correct transcript therefrom, and of all of said originals.

1302

(Seal.)

'Given under my hand and the Corporation Seal of said City, this 23d day of October, in the year 1907.

'JOHN T. CUMMINGS,
'City Clerk.'

Mr. Brinnier: Now, I offer the further proceedings of the Common Council of the City of Kingston, from pages 1536 to 1573, both inclusive, of the printed minutes, being the evidence in Parcel No. 233.

The said further proceedings of the Common Council of the City of Kingston, herein referred to, are as follows: 1303

Friday Evening, August 4, 1893.

On motion of Alderman Hamberger, the rules were suspended to hear the report of the Special Committee on a new water supply to be obtained from Bishop's Falls.

The report was read by the City Engineer.

Alderman Breitenbucher moved that the report be received and adopted, which was carried by the following vote: Ayes, Alderman Pitts, Addis, Crosby, Steinert, Goodsell, Breitenbucher, Rafferty, Halloran, Costello, Beck, Winter, Wieber, Hamberger, Thompson, Purvis, 15. Noes, Alderman Pettit, 1. 1304

Friday Evening, August 11, 1893.

On motion of Alderman Hamberger, the rules were suspended in order to hear the supplementary report of the Special Committee on a new water supply. On motion of Alderman Rafferty the report was received and adopted and ordered to be printed with the report formerly submitted and adopted.

On motion of Alderman Pitts the recommendation of the City Engineer as to methods of assessment were ordered to be omitted from the printed report, as that is included in the supplementary report. 1305

Polling places for the special election on the water supply question were then fixed as follows:

First Ward—At Firemen's Hall, Fair Street.

Second Ward—At City Hall, Union Avenue.

Third Ward—At Greeley Hall, Delaware Avenue.

Fourth Ward—At Engine House, Union Street.

Fifth Ward—At Engine House, Mill Street.

1306

Sixth Ward—At Engine House, Abeel Street.

Seventh Ward—At Engine House, Home Street.

Eighth Ward—At corner of Wall Street and St. James Street.

Ninth Ward—At Engine House, Clinton Avenue.

Alderman Pettit moved that the Corporation Counsel, City Clerk and Treasurer report as to whether the indebtedness of the city can be increased to the extent required for issuing water bonds. Which was lost.

August 25, 1893.

1307

The following named persons were appointed as inspectors of election for the special meeting to be held September 5, 1895:

First Ward, Benjamin S. Myer, Samuel D. Gibson and Frederick B. Kraft; Eighth Ward, James O. Sutton, Cyrus C. Mason and Michael J. Dunn; Ninth Ward, Theodore Houghtaling, Joseph T. Brinnier and Luther Post, with A. H. Baylor as poll clerk.

On motion of Alderman Brinnier the Board of Inspectors, were authorized to fill vacancies.

Friday Evening, September 8, 1893.

1308

The City Clerk presented the certificate of canvass of the special election held September 5, 1893, on the question of a water supply for the city, which were referred to the Committee on Elections. The Committee subsequently report that the whole number of votes given at said election was 1,498.

Of which 'For the Resolution' received 1,036 votes and 'Against the Resolution' received 462 votes.

On motion of Alderman Brinnier the report was received and ordered to be placed on file.

The special committee on water supply submitted a report in writing, which was read by the Clerk.

Alderman Halloran moved that the report be placed on file. 1309

Alderman Block moved that the report be accepted, as an amendment. The amendment was lost, Aldermen Block, Wieber and Darling alone voting in the affirmative. Alderman Halloran's motion was then carried.

Mr. Linson (interposing): That report does not seem to be contained in the proceedings. I have no doubt that the report was entered on the minutes of the City Clerk, but he did not give Mr. Burhans a record of it. It strikes me it would be well to have that.

The Witness: He was hung up by the report and resolutions, which were not in the minutes, and he put it in. 1310

Mr. Linson: That is the report that was submitted on the 16th of March, 1894.

Alderman Loughran offered the following:

Whereas, it is reported that the Committee in charge of the legal proceedings now in court for the annulling of the so-called contract with the Kingston Water Company to supply the City with water for fire purposes, etc., have engaged extra counsel to prosecute said proceedings, and

Whereas, this Common Council have full confidence in the ability of the present corporation counsel to prosecute and carry said proceedings to a successful end, therefore I think it unnecessary to go to the expense of employing other assistance; therefore, 1311

Resolved, that if at any time during the pending of the proceedings the corporation counsel should find that his ability is not sufficient to cope with the learned counsel on the opposite side he so report to this common council, and that no extra counsel be employed except on receipt of such report, and then only by a majority vote of the common council.

1312 Alderman Rafferty move that the resolution be laid over to the next meeting, which was carried. Alderman Fowler, Loughran and Wieber voting in the negative.

Alderman Loughran called up his resolution relating to the employment of an extra counsel in the suit of the water company and moved its adoption. During the progress of the debate it was stated by Alderman Hamburger and Brinnier that the bill for extra counsel would not exceed \$500.00. The vote on Alderman Loughran's resolution was as follows:

1313 Ayes—Alderman Fowler, Loughran, Steinert, Wieber, and Diamond—5.

Noes—Alderman Beck, Breitenbecher, Halleran, Rafferty, White, Costello, Forst, Thompson, Hamburger, Lang, Brinnier and Lundy—12.

Alderman Block then moved that the amount to be appropriated by the committee be limited to \$600. Alderman Wieber moved as an amendment that the sum allotted be \$500. Alderman Wieber's motion was lost, he alone voting for it. Alderman Block's motion was also lost—only Aldermen Fowler and Block voting for the same.

Aldermen Loughran, Rafferty and Hamburger were excused from voting on both motions.

1314

March 3, 1893.

A communication was received from Hon. James G. Lindsley, president of the Kingston Water Company, suggesting a committee of conference on the matter in dispute between the City and the water company.

On motion of Alderman Powers the communication was referred to the committee on water supply. Alderman Thompson moved that the corporation counsel be added to the committee, which was carried, and subsequently, on motion of Alderman

Loughran, the committee was requested to report at the next regular meeting. 1315

April 19, 1895.

The committee on water supply submitted the following report:

To the Common Council of the City of Kingston:

The undersigned, committee on water supply, to whom was referred the communication of the Kingston Water Company relating to the claims of said company against the city, and a settlement of the action therein pending, report as follows:

First: Your committee met and carefully considered the matters referred to them in order to reach, if possible, a settlement of the entire water question, so held at the City Hall a public meeting which the citizens and business men were invited to attend. After a discussion of the matter, the citizens appointed a committee, consisting of Messrs. S. D. Coykendall, Colonel J. S. McEntee, H. C. Connelly, G. J. Smith and J. W. Searing. 1316

Second: This joint committee proceeded to an earnest and careful consideration of the water question and an adjournment of the action which is now pending.

Your committee endeavored to obtain from all possible sources which could be deemed at all reliable information as to the present value of the plant and franchise of the water company. The representatives of the water company were invited to be present and confer with the joint committee, and were requested to present a proposition, which they did, as follows: 1317

First: The company to submit the question of an increased water supply to an engineer to be designated by the then city engineer, or such other engi-

1318 neer as might be designated by the city, and if those two engineers could not agree, an umpire was to be selected by them.

The limit of the cost of such increased supply not to exceed \$75,000.

This proposition to include the payment of the bills due the company, and the extension of their contract to a period of twenty years.

Second. A proposition to sell to the city for the sum of \$300,000, subject to a mortgage of \$300,000, was also presented.

1319 The joint committee, in behalf of the city, subject to approval by the common council, presented the following proposition to the Water Company:

To purchase the plant and franchise of the company on the following conditions, namely:

To pay for stock \$100,000, and assume mortgage, total \$400,000, and the claims of the water company to be paid. And also the following final proposition:

To purchase stock for \$150,000, assume mortgage \$300,000; total, \$450,000.

1320 The propositions presented by the water company were rejected by the joint executive committee, and the propositions presented by the joint committee were rejected by the water company. We, therefore, report that every effort on the part of your committee to reach an adjustment of the matter so referred to as has ended in complete failure.

On motion of Alderman Powers the report was received and placed on file. Alderman Hamburger then offered the following:

Whereas, the City of Kingston and its inhabitants are depending upon the Kingston Water Company, and its arbitrary and unreasonable action, for an adequate supply of water, and, whereas, the said

water company has refused to increase the facilities so as to furnish the city with an adequate water supply, and whereas the said company has refused to sell its plant to the city on any but exorbitant terms, be it

1321

Resolved, that the Corporation Council be directed to prepare and submit to the Legislature forthwith a bill authorizing and empowering the City of Kingston to provide for a pure and wholesome supply of water for domestic and municipal purposes, and to issue bonds therefor in a sum not to exceed \$500,000, to bear interest at the rate of three and one-half per cent. per annum.

Resolved, that such bill provide for a Board of Water Commissioners, to consist of five members, who shall be appointed by the Mayor and confirmed by the Common Council and whose term of office shall be for one, two, three, four and five years respectively, and who shall serve without compensation, and that said Board of Water Commissioners have the power to construct and maintain water works for ample supplying of the City with pure and wholesome water, and to exercise such power as may be necessary.

1322

Resolved, that there be incorporated in said bill a provision regulating the organization of said board, the manner in which water rates shall be fixed, the collection thereof, and the creation of a sinking fund to pay the principal and interest on the bonds issued.

1323

Resolved, that there be incorporated in said bill a provision empowering the city to acquire lands for the purpose of a water supply, a provision authorizing said Board of Water Commissioners, with the approval of the Common Council, to take condemnation proceedings for the purpose of condemning the lands, property, plants, dam, reservoir, mains and laterals of any person or corporation

1324 whatever for the purpose of establishing a water supply for the City of Kingston.

The resolution was adopted. On motion of Alderman Block the Corporation Counsel was directed to proceed with the defense of the suit brought by the Water Company.

May 10, 1895.

1325 'The Mayor stated that he had received from the Clerk of the State Senate a copy, duly certified, of the act entitled "An Act to provide for supplying the City of Kingston with pure and wholesome water," and he suggested that a time be fixed in which to give a public hearing on the bill.

'On motion of Alderman Block it was

'Resolved, that when this Common Council adjourn, it be to meet at the Common Council chamber, in the City Hall, on Tuesday, May 21, 1895, at 7:30 P. M., and that at said meeting a public hearing be given on the bill entitled "An Act to provide for supplying the City of Kingston with pure and wholesome water."

'May 21, 1895.

'Senate Bill No. 1303, entitled 'An Act to provide for supplying the City of Kingston with pure and wholesome water' was taken up.

1326 'No person desiring to be heard in relation to the bill, Alderman Loughran moved that the bill be approved, which was carried by the following vote:

Ayes—Aldermen Loughran, Hoffman, Diamond, Madden, Block, Quackenbush, Rafferty, Powers, Costello, Forst, Bishop, Hamburger, Thompson, Lang, Schoonmaker, Lundy and Reilly—17.

Noes—0.

Alderman Hamburger moved that a vote of thanks be tendered to Corporation Counsel Cloonan for the energy and ability he has shown in securing

the passage of the water works bill. The motion was unanimously adopted by a rising vote. 1327

May 31, 1895.

The Mayor handed down a communication naming the following persons to compose the Water Commission, under the act passed by the Legislature to provide for supplying the City of Kingston with pure and wholesome water:

John W. Searing, to serve for full term of five years.

Colonel John McEntree, to serve for four years.

Urban Hamburger, to serve for three years.

Charles W. Deyo, to serve for two years.

Samuel D. Coykendall, to serve for one year.

1328

Alderman Loughran moved that the appointments of Water Commissioners, as named by the Mayor, be confirmed, which was carried by the following vote:

Ayes—Aldermen Loughran, Hoffman, Diamond, Block, Quackenbush, Rafferty, Costello, Weiss, Forst, Bishop, Lang, Schoonmaker and Reilly—13.

Noes—0.

Alderman Powers and Hamburger were excused from voting.

April 24, 1896.

1329

Alderman Powers offered the following resolution:

Resolved, that pursuant to an act of the Legislature of the State of New York, entitled 'An Act to authorize the City of Kingston to audit, determine and settle the claim of the Kingston Water Company against said city and to issue bonds in payment thereof,' the Mayor and Treasurer of the City of Kingston are hereby authorized and directed to issue, in the name of, and under the corporation

1330 seal of said city, bonds in the sum of \$33,000, or so much thereof as may be necessary to pay the claim of the Kingston Water Company against the City of Kingston.

Said bonds to bear interest at the rate of four per centum per annum, payable semi-annually at the office of the Treasurer, on the first days of March and September of each year.

The bonds shall be so classified that \$5,000 thereof shall become due and payable on the 1st day of March, 1897; \$5,000 on the 1st day of March, 1898; \$5,000 on the 1st day of March, 1899; \$5,000 on the 1st day of March, 1900; \$5,000 on the 1st day of March, 1901; \$5,000 on the 1st day of March, 1902; and the balance thereof on the 1st day of March, 1903.

Resolved, that said bonds shall be sold at public auction, at the front door of the City Hall, in said City, at not less than par, upon ten days' notice of such sale, to be published in the official newspapers of said city, and that the proceeds thereof shall be paid into the city treasury and used for the purpose of paying the claims of the Kingston Water Company against the City of Kingston, and for no other purpose whatever. The resolution was adopted by a unanimous vote, under a call of the roll.

1332 Alderman Powers also offered the following resolution:

Resolved, that pursuant to the provisions of Chapter 803, of the Laws of 1895, and the Acts amendatory thereof, passed 1896, the Mayor and Treasurer of the City of Kingston are hereby authorized and directed to issue bonds in the sum of \$600,000 in the name of and under the corporate seal of the said city, for the purposes specified in said Act.

Mr. Brinnier: I guess they must have purchased

it, or agreed to purchase the old water works by that time. 1333

Mr. Linson: That was Chapter 803, of the Laws of 1895, and Chapter 315 of the Laws of 1896 amended it.

Chapter 803, Laws of 1895, New York State.

An Act to provide for supplying the City of Kingston with pure and wholesome water.

Accepted by the City.

Became a law May 27, 1895, with the approval of the Governor. Passed by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. There shall be in the City of Kingston, as a department of its municipal government, a board which shall be designated 'The Board of Water Commissioners of the City of Kingston,' to consist of five members, who shall be freeholders within said city, and a majority of them shall constitute a quorum for the transaction of business. The members of said board shall be appointed by the mayor of said city, and confirmed by the common council thereof, and shall hold their offices for the terms of one, two, three, four and five years, respectively. If the office of any of said water commissioners shall, for any cause, become vacant, the mayor of said city shall have the power to fill the vacancy for the residue of the unexpired term by appointment, subject to conformation by the common council. As the term of each of said commissioners expires his successor, who shall hold office for the term of five years, shall be appointed by the mayor, subject to confirmation by the common council. The said commissioners may be suspended or removed from office for cause, in like manner as other officers of the City of Kingston. 1334

Section 2. The commissioners shall choose one 1335

1336 of their number as president of said board, and shall appoint a secretary, a treasurer and such other officers, agents and employees as they deem necessary, removable at their pleasure, and shall fix their compensation, which may be altered or abolished in the discretion of the board. The members of said board shall serve without pay, but shall be allowed their reasonable expenses.

Section 3. The office of water commissioner, holding office under this act, shall become vacant by his death, resignation, removal from said city, his refusal or neglect for six months to perform the duties of his office, without being excused by a vote of the board, or by his becoming of unsound mind or ceasing to be a freeholder. Resignations may be made in writing to the mayor of said city.

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Section 4. The Board of Water Commissions is hereby authorized and empowered, with the assent of the Common Council, to construct and maintain water works for amply supplying said city and the inhabitants thereof with pure and wholesome water, and to exercise such other powers as are necessary or appropriate to accomplish that purpose and in exercising such other authority and powers, shall proceed in the manner hereinafter described.

1338 Section 5. Said Board of Water Commissioners before deciding upon or adopting any plan, system or source of water supply for said city, shall, at an expense of not exceeding one thousand dollars (which the said Water Commissioners may, with the assent of the Common Council, borrow for the purpose on the credit of the City of Kingston), cause all the various plans, systems and sources of water supply for said city which may, by any citizen or citizens, officer or officers thereof, be submitted to it in writing for consideration, to be in-

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 vestigated and such preliminary surveys and estimates to be made as said board may deem expedient (and it shall be lawful to enter upon the lands or property of any person or corporation, whether situated within the limits of the City of Kingston or County of Ulster for the purpose of such investigation and surveys) and as soon thereafter as may be, the said Board of Water Commissioners shall adopt such part or parts of said plans, systems and sources of water supply for said city as in its judgment may be the most feasible and best adapted to supply the requisite quantity and quality of water, and shall make a report to the Common Council of said city, 1340
 clearly specifying and describing each plan, system and course so investigated as aforesaid, the advantages and disadvantages of each and the probable expense of each method, and of supply from each source, including the cost of purchase and condemnation of lands for that purpose, and shall in the same report state the plan, system and source adopted and the reason therefor; which said report shall be filed with the City Clerk of said city and be open to public inspection. The said Board of Water Commissioners shall have power to include in any such report the lands, property, dam, water supply, mains, laterals and appurtenances of any water company now existing for the purpose of obtaining a water supply for said city, and may acquire title to the same in the manner hereinafter provided. The said Board of Water Commissioners, with the assent of the Common Council of said city, are authorized and empowered to select and determine upon any of the plans so reported, or any modifications thereof, which may be deemed necessary and adequate. 1341

Section 6. In order to carry into effect the pur-

- 1342 poses of this Act and to pay the expenses of such preliminary survey and investigation, and of constructing and maintaining the water works for said city, and for acquiring lands and easements anywhere within the County of Ulster, for the purpose of such water works by condemnation or purchase, the City of Kingston shall have power, upon making and filing by the Board of Water Commissioners of the report aforesaid, but not before, to issue bonds to such an amount as may be necessary, not exceeding the sum of five hundred thousand dollars. Said bonds shall be issued in the name of, and under the seal of said city, and signed by
- 1343 the Mayor and Treasurer thereof, with interest coupons, in such denominations or amounts as the Board and Common Council may deem expedient, but not less than fifty dollars each, with interest at the rate of three and a half per centum per annum, payable semi-annually at the office of the Treasurer of said city on the first days of February and August of each year, and shall be so classified and issued that at least two per centum of the principal thereof shall become due and payable in each year; said bonds shall not be sold at less than par and none of them shall be sold until wanted for the expense of acquiring said lands and easements, or of work done or services rendered or materials
- 1344 furnished. The proceeds of said bonds shall be paid over to the City Treasurer of said city and credited to a fund which shall be known as 'Water Fund Account' and shall only be paid out on warrants numbered consecutively as issued and signed by the president and treasurer of said Board of Water Commissioners; which warrants shall be issued only as far as necessary for the purposes aforesaid. The amount derived from receipts from all sources as hereinafter provided shall be applied to the payment of the cost of maintenance, opera-

ing and extending the said system of water works and to the payment of the principal, and interest falling due on said bonds, and in each year in which said amount shall be insufficient for that purpose, the Common Council of said city shall make due provision by tax for the payment of the deficiency, and such deficiency shall be assessed, levied and raised in the same manner as any other general tax of said city, and in addition to and in connection with the general taxes of said city. 1345

Section 7. The plan, system and source of water supply for said city having been adopted as aforesaid, the said Board of Water Commissioners shall proceed to acquire the necessary land and easements to procure such water supply from the course chosen, to construct and maintain water works for said city, according to the system or plan adopted, and to put and keep the same in operation. The said Board shall also fix upon and determine the streets through which the distributing pipes of said water works shall be laid, and may extend the same from time to time as they shall determine, or the Common Council shall require, and it shall have full power and authority to use any street, road or highway in carrying out the objects and purposes of this act. 1346

Section 8. The said Board of Water Commissioners shall make, publish and enforce all needful rules and regulations in relation to the said water works and all the property and appliances pertaining thereto and in relation to the management thereof and the supply of water thereby, whether to individuals or corporations, and may alter or modify the same from time to time and may fix a penalty not exceeding fifty dollars for the violations of any of said rules or regulations. The said Common Council may aid such enforcement by or- 1347

1348 dinance. The said Board may prosecute in its own, or in the name of said city, for all violations of said rules, regulations or ordinances.

Section 9. The said Board of Water Commissioners shall fix and collect the annual, quarterly or monthly prices of water supply by means of said waterworks to the dwellings, establishments or uses of individuals, companies or corporations.

1349 Section 10. The moneys derived from the penalties and the prices of water supply mentioned in Sections 8 and 9 of this act shall be paid over to the City Treasurer to the credit of the 'Water Fund Account,' and shall be applied first to the payment of the ordinary maintenance and management of said water works, and shall be paid out upon such warrants as are prescribed in and by Section 6 of this act. If the receipts from all of said sources shall be more than sufficient for said purposes, the balance thereof shall be applied by the said Treasurer to the payment of the principal and interest on the bonds issued by said city pursuant to and for the purposes mentioned in Section 6 of this act, and to no other purpose or purposes whatever. Whenever said receipts shall be more than sufficient for both of these purposes, the balance thereof may be used for any lawful municipal purpose.

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Section 11. The said Board of Water Commissioners shall keep books showing the cost of construction and the maintenance of said waterworks, and of extending the same, and all its collections, receipts, expenditures, proceedings and doings, and shall make a report thereof to the said Common Council on the first day of November in each year, and as much oftener as the Common Council may require.

Section 12. Any willful act whereby the said

water works, or any property, apparatus or appliances pertaining thereto shall be injured, or the supply of water obstructed, impaired or made less pure, shall be deemed a misdemeanor, and the person or persons convicted thereof shall be punished accordingly. 1351

Section 13. The title to all lands, easements and properties of whatever kind acquired for the purposes of this act shall vest in the City of Kingston. The said Board of Water Commissioners may take deeds of said lands and easements, in the name of said city, as grantee, and the said deeds shall state the purposes for which said lands or easements are conveyed. 1352

Section 14. The said Board of Water Commissioners are hereby authorized and empowered to acquire by purchase or proceedings, the condemnation of real property pursuant to the provisions of Title 1, Chapter 23, of the Code of Civil Procedure, any lands, easements, water rights, dam, water plant, water mains, laterals and appurtenances within the limits of the County of Ulster, whether owned or possessed by individuals or water companies, organized pursuant to the laws of this State.

Section 15. This Act shall take effect immediately. 1353

CHAPTER 315.

An Act to Amend Chapter 803 of the Laws of 1890, entitled, 'An Act to Provide for Supplying the City of Kingston with Pure and Wholesome Water.'

Accepted by the city.

Became a law April 17, 1896, with the approval

1354 of the Governor, Passed, three-fourths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 2, of Chapter 803, of the Laws of 1895, entitled 'An Act to provide for supplying the City of Kingston with pure and wholesome water,' is hereby amended to read as follows:

Officers and Employes of Board.

Expense of Members.

1355 Section 2. The Commissioners shall select a president and secretary from among their number and appoint such agents and servants as may be necessary, and fix their compensation. Such agents and servants shall be removable at the pleasure of the Board. The Commissioners shall serve without pay, but shall be allowed their reasonable expenses.

Section 3. Section 6 of said act is hereby amended to read as follows:

Issue and Sale of Bonds.

1356 Section 6. In order to carry into effect the purposes of this Act and to pay the expenses of such preliminary surveys and investigation, and of constructing and maintaining water works for said city and for acquiring lands and easements anywhere within the County of Ulster, for the purpose of such water works by purchase or condemnation, the City of Kingston shall have power, upon making and filing by the said Board of Water Commissioners of the report aforesaid, but not before, to issue bonds, which, together with the interest thereon, shall be payable in gold in such amount as may be necessary, not exceeding the sum of six hundred thousand dollars. Such bonds shall be issued in the name and under the seal of said city, and signed

by the Mayor and Treasurer thereof, with interest coupons attached in such denominations or amounts as the Board and Common Council shall deem expedient, but not less than fifty dollars each, with interest at the rate of three and a half per centum per annum, payable semi-annually at the office of the Treasurer of said city on the first days of April and October of each year, and shall be so classified and issued that twenty-four thousand dollars shall become due and payable in sixteen years from the date of issue and twenty-four thousand dollars of such principal each year thereafter. The proceeds of the said bonds shall be paid over to the City Treasurer of said city and credited to a fund which shall be known as 'Water Fund Account' and shall be only paid on warrants numbered consecutively as issued and signed by the president and secretary of the Board of Water Commissioners, which warrants shall only be issued as fast as necessary for the purposes aforesaid. The amount derived from receipts from all sources as hereinafter provided shall be applied to the payment of the cost of maintaining, operating and extending the said system of water works and to the payment of principal and interest falling due on said bonds, and in each year in which said amount shall be insufficient for that purpose, the Common Council of said city shall make due provisions by tax for the payment of the deficiency, and such deficiency shall be assessed, levied and raised in the same manner as any other general tax of said city, and in addition to and in connection with the general taxes of said city.

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Section 3. Section 14 of said act is hereby amended to read as follows:

Section 14. The said Board of Water Commissioners are hereby authorized and empowered to ac-

- 1360 quire by purchase or proceedings for the condemnation of real property, pursuant to the provisions of Title 1, Chapter 23, of the Code of Civil Procedure, any lands, property, franchises, easements, water rights, rights of flowage, dam, water plant, water mains, laterals and appurtenances within the limits of the County of Ulster, whether owned or possessed by individuals, or water or any other companies, organized pursuant to the laws of this State, or the Common Council of the city upon the written request of said Board may acquire title to such lands, property, franchises, easements, water rights, rights of flowage, dam, water plant, water mains, laterals and appurtenances, pursuant to the provisions of the city charter relating to acquiring title to lands for municipal purposes, except that the costs and expenses thereof shall be paid from the water fund account on warrants signed by the treasurer and secretary of the Board.
- 1361

Section 4. This act shall take effect immediately.

Mr. Brinnier continued reading as follows:

- Said bonds shall be in such denominations or amounts as the Board of Water Commissioners and the Common Council may deem expedient, but not less than fifty dollars each, and shall, together with the interest thereon, be payable in gold. The bonds shall be so classified that \$24,000 thereof shall become due and payable on the first day of April, 1912, and \$24,000 on the 1st day of April of each year thereafter until all are paid and retired.
- 1362

Said bonds shall bear interest at the rate of three and one-half per centum per annum, payable semi-annually by coupon on the first days of April and October in each year.

Said bonds shall be sold at public auction at the front door of the City Hall in said city after due notice of such sale, and the proceeds thereof shall be paid into the treasury of said city and credited

to a fund which shall be known as the 'Water Fund Account.' 1363

Said bonds shall be prepared and procured by the Board of Water Commissioners, and the expenses incurred in the printing and advertising of the same shall be paid by the said Board of Water Commissioners.

The resolution was adopted by a unanimous vote under a call of the roll.

On motion of Alderman Block the sale of the bonds was also ordered to be published in the Daily Express.

April 24, 1896.

1364

The Committee on Water Supply reported in writing in favor of locating a drinking fountain at the corner of Sycamore Street and the Strand, and also in favor of extending the water mains in O'Reilly Street, and in the vicinity of the old glue factory; and on motion of Alderman Quackenbush the report was adopted and referred to the water board.

Special Meeting, June 25, 1896.

At a special meeting of the Common Council of the City of Kingston, held on Thursday, evening, June 25, 1896, there were present his Honor, Mayor Wieber presiding, and Aldermen Hoffman, Loughran, Madden, Chappell, Quackenbush, Tammany, Powers, Irwin, Weiss, Beck, Bishop, Holmes, Thompson, Hamburger, Lang and Reilly.

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The Mayor stated that the special meeting had been called for the purpose of taking some action in relation to the present issue of water works bonds, and also to act on the claims presented for a rebate on the excise moneys, paid by the liquor dealers, a large number of which were presented and referred to a committee on auditing accounts,

1366 with a request that the committee act on the same at the present meeting.

The following communication was read from the Board of Water Commissioners of the City of Kingston:

To the Common Counsel of the City of Kingston:

At a meeting of the Board of Water Supply Commissioners, held June 25, 1896, the following resolution was unanimously adopted:

1367 'Resolved, That the denomination of the water bonds, heretofore sold to S. D. Coykendall be fixed at one thousand dollars (\$1,000) each, and that a copy of this resolution be transmitted to the Common Council.' Alderman Powers moved that the resolution be approved, which was adopted by a unanimous vote under a call of the roll.

At a request of the president of the Board of Water Commissioners the following preambles and resolutions were read:

1368 Whereas, pursuant to a resolution of the Common Council of the City of Kingston, adopted April 12, 1896, the water bonds of the City of Kingston to the amount of six hundred thousand dollars (\$600,000), bearing interest at the rate of three and one-half per centum per annum, payable semi-annually on the first days of April and October, principal and interest payable in gold coin of the United States of America, were advertised to be sold at public auction on the 11th day of June, 1896, and notice of such sale was duly published in the official newspapers of the city for more than ten days, and

Whereas, said bonds were duly sold on said date to S. D. Coykendall, at not less than par and interest, he being the highest bidder, and

Whereas, it was not provided in said resolution that the first installment of principal of said bonds of twenty-four thousand dollars (\$24,000) should become due and payable on the first day of April, 1912, and said purchaser has requested that said bonds be dated June 1, 1896, and that the said first installment of principal be made due and payable June 1, 1912, and

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Whereas, the Board of Water Commissioners of said city by resolution had requested that the denomination of said bonds be fixed at one thousand dollars (\$1,000) each,

Now, therefore, be it resolved by the Common Council of the City of Kingston, that, pursuant to Title 9, of Chapter 747, of the Laws of 1896, and for the purposes mentioned in said title, to-wit, the acquisition of a proper water supply for said city, said bonds to the amount of six hundred thousand dollars (\$600,000) be and the same hereby are ordered to be executed and delivered to said purchaser upon payment of the purchase price.

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Be it further resolved, that said bonds shall be dated June 1, 1896, and shall be so classified that twenty-four thousand dollars (\$24,000) thereof shall become due and payable on the 1st day of June, 1912, and twenty-four thousand dollars (\$24,000) thereof on the first day of June of each year thereafter until all are paid and retired. Said bonds shall be of the denomination of one thousand dollars (\$1,000) each, bear interest at the rate of three and one-half per centum per annum, payable semi-annually on the first days of April and October of each year, except the last payment of interest, which shall be paid at the time of the payment of the principal of the bonds shall be payable, principal and interest, in gold coin of the United States of America, at the office of the City Treas-

1371

1372 urer, and shall be substantially in the following form :

United States of America,
State of New York,
County of Ulster,
The City of Kingston,

Series K.

No. _____

\$1,000.00

1373

The City of Kingston hereby acknowledges itself indebted, and promises to pay to the bearer, if registered, to the registered holder hereof, the sum of one thousand dollars in gold coin of the United States of America, at the office of its City Treasurer, in the City of Kingston, on the first day of June in the year _____, with interest thereon, in gold coin, at the rate of three and one-half per centum per annum, payable semi-annually at said office of its City Treasurer, on the first days of October and April in each year and every year on the presentation and surrender of the annexed coupons as they respectively become due.

The foregoing bond is issued under the provisions of Chapter 747, of the Laws of 1895.

1374

In witness whereof, the Mayor of said City of Kingston, and the Treasurer thereof, in pursuance of resolution passed by the Common Council of said city, have hereto set their hands and affixed the seal of said city this first day of June, A. D., 1896.

_____, Mayor.

_____, Treasurer.

Last two months interest, amounting to \$5.83. 1375
payable with bond.

Coupon.

Series K.

No. _____

\$17.50

On the first day of April or October _____, the City of Kingston will pay to the bearer at the office of the Treasurer of said city, seventeen and fifty one-hundredths dollars in gold of the United States of America, being six months' interest on annexed bond No. _____

_____, Mayor.

_____, Treasurer.

1376

Resolved further, that in order to facilitate the conversion of said bonds into registered bonds, pursuant to Section 10 of the General Municipal Law, in the event that any holder or holders, or all or any of said bonds shall so request, the following certificate shall be printed or engraved on the backs of each of said bonds.

State of New York,
County of Ulster,
City of Kingston.

It is hereby certified that the holder of the within bond having, pursuant to Section 10 of the General Municipal Law, presented to the undersigned a written request for its conversion into a registered bond, we have this day cut off and destroyed the coupons attached thereto, said coupon being in number, and of the value of \$17.50 (except coupon No. 1, which is for \$11.67) and that the interest at the rate and on the date, and in the medium of payment, as was provided by said coupons, as well as the principal, is to be paid to said owner, his

1377

- 1378** legal representatives, successors or assigns, at the office of the Treasurer of the City of Kingston, or, in the event that the registered owner so requests, said interest and principal will be remitted to him in New York exchange.

Alderman Powers moved the adoption of the preamble and resolutions, which motion was seconded by Alderman Beck and adopted by the following vote: Ayes—Aldermen Hoffman, Loughran, Madden, Chappell, Quackenbush, Tammany, Powers, Weiss, Irwin, Beck, Bishop, Holmes, Thompson, Hamburger, Lang and Reilly—16.

Noes—0.

- 1379** The Mayor handed down a communication re-appointing Samuel D. Coykendall as a member of the Board of Water Commissioners, to succeed himself, for the term of five years from the 31st day of May, 1896.

Aldermen Powers moved that the appointment be confirmed, which was carried as follows: Ayes—Aldermen Hoffman, Chappell, Quackenbush, Powers, Irwin, Weiss, Bishop, Holmes, Lang, Reilly and Doyle—11.

Noes—0.

July 24, 1896.

- 1380** The following report of the sale of water bonds was presented and ordered to be placed on file:

'To the Common Council of the City of Kingston:

'Pursuant to the provisions of Chapter 747, of the Laws of 1896, there were sold, at public auction, at the City Hall, on the 11th day of June, 1896, \$600,000 of city bonds, issued for the purchase of the water works and the improvements of the same. Said bonds are known as Series K, and bear interest at the rate of three and one-half per centum per annum, payable semi-annually, on the

first days of April and October, principal and interest payable in gold. 1381

The entire issue was sold to Samuel D. Coykendall, at a premium of one one-hundredths per cent. and accrued interest from June 1 to date of delivery.

The amount realized from the said sale was as follows:

Par value of bonds.....	\$600,000.00
Premium on same.....	60.00
Accrued interest.....	2,333.33

Total sum realized from sale of bonds. . \$602,393.33

All of which has been paid into the City Treasury to the credit of the water fund. 1382

Respectfully submitted,

H. E. WIEBER, Mayor.

Dated July 24, 1896.

JAMES E. PHINNEY,

City Treasurer.

The following report was also submitted and ordered to be placed on file:

To the Common Council of the City of Kingston:

We respectfully report that, pursuant to a resolution of your honorable body, passed April 24, 1896, \$33,000 of bonds is issued pursuant to an act the Legislature, to pay the indebtedness due to the water company, were sold at public auction at the City Hall on July 17, 1896. Said bonds are known as Series I, and bear interest at the rate of four per cent. per annum, payable semi-annually on the first days of March and September. 1383

The entire issue was sold to the Ulster County

- 1384** Savings Institution and realized, with the premiums and accrued interest, as follows:

Par value of bonds	\$33,000.00
Premium on the same	145.00
Accrued interest from April 24	311.66

Total amount received from same \$33,456.66

From which there has been paid:

For printing of the bonds	\$20.00
For advertising of the same	12.60

Total expense of issue 32.60

1385

Balance paid into the treasury \$33,426.06

All of which is respectfully submitted,

H. E. WIEBER, Mayor.

Dated July 24, 1896.

JAMES E. PHINNEY,
City Treasurer."

"August 28, 1896.

1386

The Committee on Water Supply reported in favor of extending the water main to the Colonial Glass Works; also in Smith avenue, from Cornell street to O'Neill street, and on Gage street from Foxhall avenue to Farrell street.

The Committee further recommended that in future all applications for the extension of water mains must state the number of houses along the line proposed to be extended.

On motion of Alderman Reilley, the report was adopted.

A communication was read from the Mayor

appointing George J. Smith as a member of the Board of Water Commissioners, caused by the death of Charles W. Deyo. 1387

Alderman Powers moved that the appointment be confirmed, which was carried by the following vote: Ayes—Aldermen Hoffman, Loughran, Chappell, Quackenbush; Tammany, Powers, Bishop, Holmes, Thompson, Hamburger, Schoonmaker, Lang, Reilley and Doyle—14.

Alderman Irwin not voting.

A petition was presented for the extension of the water main in Lindsley place, which was referred to the Committee on Water Supply."

1388

"October 16, 1896.

The Committee on Water Supply reported in favor of extending the water main through Lindsley place from Downs street to Elmendorf street, and in accepting the proposition of Mr. Mahar to maintain a drinking fountain at Wilbur, the city to furnish the water free of cost.

On motion of Alderman Beck, report was adopted."

"February 5, 1897.

1389

A communication was read from the Board of Water Commissioners, accompanied by a request that the Common Council authorize the issue of an additional \$150,000 of water bonds, in order to complete the improvements in the water plant.

On motion of Alderman Beck, the communication was received and filed."

1390

" March 12, 1897.

Alderman Brinnier offered the following resolutions :

Resolved, that the Mayor report to the Common Council, at the next hearing, a detailed statement of receipts and expenditures of the Water Commissioners, and insist that a report be made by them, and that he may transmit the same to the Common Council."

March 19, 1897.

1391

"A communication was read from the Mayor, in response to the resolution of Alderman Brinnier, calling for a detailed report of the Water Board, to the effect that he had laid the matter before the president of the Water Board, who promised that such report will be presented in a few days. The communication was ordered to be placed on file."

April 2, 1897.

"A report was received from the Board of Water Commissioners, accompanied by a certificate from Haskins & Sells.

1392

"And the same was received and ordered to be placed on file.

State of New York, }
 County of Ulster, } ss. :
 City of Kingston, }

"I, Dayton Murray, City Clerk of the City of Kingston, do hereby certify that I have compared the preceding transcript of minutes of the Common Council of the City of Kingston, in regard to action or report of Committee on New Water Sup-

ply, with the original on record in the office of the City Clerk of said city, and that the same is a correct transcript therefrom, of the whole of said original. 1393

"Given under my hand and the corporate seal of said city, this 19th day of July, in the year one thousand nine hundred nine.

(Signed) DAYTON MURRAY.

(Seal)

City Clerk.

Mr. Linson: There isn't anything here which shows what was done. Of course, it is stated here in the minutes and probably that is sufficient.

Mr. Brinnier: Well, the fact is, they simply bought these water works. 1394

Mr. Linson: Instead of building their own water works.

The Chairman: Suppose you take that as a conceded fact, that they bought this existing water works, owned by the Kingston Water Company.

Mr. Linson: They bought the water works of the Kingston Water Company, referred to in these resolutions, and paid for it by the proceeds of \$600,000 worth of bonds.

The Chairman: Without taking or condemning any land?

Mr. Linson: Yes.

Mr. Brinnier: Yes. 1395

The Chairman: That is taken on the minutes as conceded by counsel on both sides.

Mr. Brinnier: Now, I offer in evidence the maps of the Ramapo Water Company, on file in the County Clerk's Office and numbered as follows:

Company No. 36, File No. 286.

Company No. 37, File No. 287.

Company No. 38, File No. 290.

Company No. 39, File No. 288.

Company No. 40, File No. 292.

Company No. 41, File No. 293.

1396

Company No. 42, File No. 291.
Company No. 43, File No. 289.
Company No. 94, File No. 307.
Company No. 95, File No. 308.
Company No. 96, File No. 309.
Company No. 98, File No. 310.
Company No. 99, File No. 311.
Company No. 100, File No. 312.
Company No. 101, File No. 313.
Company No. 104, File No. 314.
Company No. 105, File No. 315.
Company No. 106, File No. 316.
Company No. 107, File No. 317.

1397

Company No. 108, File No. 318.
Company No. 109, File No. 319.
Company No. 110, File No. 320.
Company No. 111, File No. 321.
Company No. 112, File No. 322.
Company No. 113, File No. 323.
Company No. 115, File No. 324.
Company No. 159, File No. 341.
Company No. 160, File No. 343.
Company No. 163, File No. 344.
Company No. 169, File No. 345.
Company No. 170, File No. 346.
Company No. 171, File No. 347.

1398

Company No. 168, File No. 348.
Company No. 173, File No. 359.
Company No. 194, File No. 364.
Company No. 196, File No. 365.
Company No. 190, File No. 366.
Company No. 122, File No. 367.
Company No. 195, File No. 368.
Company No. 201, File No. 369.
Company No. 191, File No. 370.
Company No. 177, File No. 371.
Company No. 193, File No. 372.

Being the evidence in Parcel No. 233.

Q. Mr. Burhans, you have looked at these maps? 1399

A. I have looked at some of them.

Q. Covering what applications; what portions, Ulster County?

A. Ulster County.

Q. Portions of Ulster County?

A. And portions of Greene County.

Q. Covering what applications: what portions of Ulster County?

A. Well, Nos. 36, 37, 38, 39, 40, 111 and 112, company's numbers. They cover that section.

Q. They cover what?

A. In the Towns of Olive, Marbletown, Shandaken and Woodstock.

1400

Mr. Brinnier: I offer in evidence the certificate of incorporation of the Ramapo Water Company, now in evidence before Commission No. 1.

The following is a copy of said certificate of incorporation of the Ramapo Water Company:

'State of New York, City of Brooklyn, County of Kings.

'We, George A. Evans, Josiah G. Chase and William J. McAlpine, do by these presents, pursuant to and in conformity with the Act of the Legislature of the State of New York, passed on the 17th day of February, one thousand eight hundred and forty-eight, entitled 'An Act to assist the formation of corporations for manufacturing, mining, mechanical or chemical purposes,' and the several acts of the Legislature amendatory thereof, associate ourselves together and form a company under the name and style of 'Ramapo Water Company,' and the following are declared to be the corporate name of the said company; the object for which the company is formed; the amount of the capital stock of

1401

1402 the said company; the number of shares of which the said capital stock of the company shall consist; the term of the existence of the company; the number of directors and their names; the names of those who shall manage the concerns of the said company for the first year; the name of the town and county in which the operations of the said company shall be carried on.

'1. The corporate name of the said company is hereby declared to be "Ramapo Water Company."

1403 '2. The objects for which the company is formed are as follows: The accumulating, storing, conducting, selling, furnishing and supplying water for mining, domestic, manufacturing, municipal and agricultural purposes to cities, to other corporations, and to persons that may lawfully contract therefor.

'3. The capital stock of the said company shall be two million five hundred thousand (\$2,500,000) dollars, which shall be divided into twenty-five thousand (25,000) shares of one hundred (\$100) dollars.

1404 '4. The said company shall commence on the 13th day of September, in the year one thousand eight hundred and eighty-seven, and shall continue in existence for the term of fifty years.

5. The number of trustees shall be five. Their names are: George A. Evans, of Brooklyn, N. Y.; Josiah G. Chase, of Cambridge, Mass.; William J. McAlpine, of Staten Island, N. Y.; Daniel B. Hatch, of New York City, N. Y.; Henry Martin Blanchard, of New York City, N. Y.

The names of those who shall manage the concerns of the said company for the first year are: George A. Evans, Josiah G. Chase, William J.

McAlpine, Daniel B. Hatch and Henry Martin 1405
Blanchard.

'6. The name of the town and county in which the operations of said company are to be carried on: The operations of the company are to be carried on mainly in the counties of Rockland and Orange, State of New York, and the municipal office for the transaction of business shall be Brooklyn, N. Y.

Witness our hands and seals this 12th day of September, 1887.

(Signed) GEORGE A. EVANS (Seal.)

(Signed) JOSIAH G. CHASE (Seal.)

(Signed) WILLIAM J. MCALPINE (Seal.)

1406

'Witness:

'P. Elbert Nostrand.

'State of New York,
City of New York, } ss.:
County of New York,

'On the 12th day of September, in the year one thousand eight hundred and eighty-seven, before me personally came George A. Evans, Josiah G. Chase and William J. McAlpine, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they acknowledged that they executed the same.

1407

(Signed) P. ELBERT NOSTRAND,

Notary Public,

Kings County.

Certificate filed in New York County.'

Attached to and apparently forming a part of this document is a duplicate treasurer's receipt, reading as follows:

1408 \$3,125.

TREASURER'S OFFICE, STATE OF NEW YORK,

Albany, September 14, 1887.

'Received from Ramapo Water Company, \$3,125, in full of taxes of one-eighth of one per cent. upon the capital stock of \$2,500,000 of the above named company, for the privilege of said organization, pursuant to Chapter 143, Laws of 1886.'

(Signed) C. R. HALL,
Deputy Comptroller.

1409

(Signed) ELLIOT DANFORTH,
Deputy Treasurer.

Attached to the certificate of the acknowledgment of the notary public is the certificate of the Clerk of the City and County of New York, and the Clerk of the Supreme Court of the said State, City and County, certifying that P. Elbert Nostrand was at the time of taking the proof of acknowledgment, a notary public, duly authorized to take the same. Said certificate is dated the 13th day of September, 1887, and is signed by James A. Black, Clerk, and bears the seal of the County Clerk of New York County.

1410

It is endorsed: 'Filed and recorded September 14, 1887, at 11:30 A. M.' Also endorsed: 'September 14, 1887. Recorded in Liber 2, page 502.'

Report of Commissioners.

1411

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Application and Petition of
JOHN A. BENSEL, CHARLES N.
CHADWICK and CHARLES A.
SHAW, constituting the Board
of Water Supply of the City of
New York, to acquire real
estate for and on behalf of the
City of New York, under Chap-
ter 724 of the Laws of 1905 and
the Acts amendatory thereof,
in the Town of Hurley, Ulster
County, New York, for the pur-
pose of providing an additional
supply of pure and wholesome
water for the use of the City
of New York.

1412

1413

To the Circuit Court of the United States for the
Southern District of New York:

We, GEORGE E. WELLER, FRED H. PARKER, GEORGE
W. BATTEN, duly appointed Commissioners of Ap-
praisal in the above entitled matter by an order of
the Supreme Court, dated May 22d, 1909, to ascer-
tain and appraise the compensation to be made to
the owners of and all persons interested in the land

- 1414 embraced within Parcel 733, as described in the petition for the appointment of said Commissioners and laid down and indicated upon a certain map filed in the office of the Clerk of the County of Ulster, on March 4, 1909, and known as Section 15, as proposed to be taken or affected for the purpose indicated in said Act and to exercise and discharge all the powers and duties conferred upon said Commissioners by Chapter 724 of the Laws of 1905, and the Acts supplementary thereto and amendatory thereof, and to discharge the duties laid upon such Commissioners by said Act, and without unnecessary delay to ascertain and determine the compensation which justly ought to be made by the City of New York to the owners of and all persons interested in said real estate sought to be acquired or affected by said proceeding, and upon such ascertainment and determination, report the same to this Court as provided in said Act, and the Supreme Court of the State of New York, having by an order, dated April 29, 1910, removed the proceeding so far as it affects Parcel 733, Section 15, William Sage, Jr., claimant, to the United States Circuit Court for the Southern District of New York, said order further directing the Clerk of the Supreme Court of the State of New York to make up the record in said proceeding for transmission to the United States Circuit Court for the Southern District of New York, we, the Commissioners herein named, do respectfully report as follows:
- 1415
- 1416

That upon the 27th day of May, 1909, we duly took and subscribed the oath required by the Twelfth Article of the Constitution of the State of New York. That said oath was duly filed in the office of the Clerk of the County of Ulster upon the 27th day of May, 1909, and certified copies thereof duly filed in the office of the Clerk of the

County of New York upon the 28th day of May, 1417
1909.

That upon the 17th day of April, 1911, we viewed the real estate laid down upon said maps and embraced in Parcel 733 as shown thereon, and carefully examined the same.

That thereafter from time to time, we have met, heard, considered and determined the claims presented to us which is herein reported on, and have heard the proofs and allegations of the persons claiming to be entitled to or interested in so much of the real estate as laid down upon the said maps as is hereby reported on, and such proofs and allegations as have been offered on behalf of the petitioners herein and the City of New York. 1418

That we have reduced to writing the testimony taken before us, which testimony is filed herewith, and have hereto annexed a copy of the map herein referred to and filed as hereinbefore set forth.

That after hearing such claims, proofs, allegations and testimony, and making such view and examination, and carefully considering the same, we did, all being present, and without unnecessary delay, ascertain and determine the compensation which ought justly to be made by the City of New York to the owners of and all persons interested in the real estate described herein and included in this report. 1419

A brief description of the land shown upon said map as taken or affected by these proceedings, the respective amounts of compensation ascertained and determined by us as aforesaid, a statement of the respective owners or persons entitled to or interested in the same, together with our recommendation of the sums which seem to us proper to be allowed as costs, expenses and disbursements, including reasonable compensation for witnesses to be paid to the former owner of and all persons interested in the said real estate, is as follows:

1420

PARCEL No. 733.

All that certain piece or parcel or real estate situated, in the Town of Hurley, County of Ulster, and State of New York, designated on the map hereinbefore referred to as Parcel Number 733, which said parcel is described as follows:

1421

Beginning at the northwest corner of Parcel No. 736, in the easterly line of Parcel No. 735, and running thence partly along said line, N. $20^{\circ} 39'$ W. 613.9 feet to the most southerly point of Parcel No. 734; thence along the easterly line of said parcel, N. $24^{\circ} 33'$ E. 354.8 feet to the northeast corner of same, in the center of a road leading from West Hurley to Glenford; thence along the center line of said road, and partly along the northerly line of said parcel, N. $64^{\circ} 02'$ W. 124. feet to the most northerly point of said parcel, in the before mentioned easterly line of Parcel No. 735; thence partly along said line, and continuing along the center line of said road, N. $42^{\circ} 35'$ W. 85.6 feet and N. $26^{\circ} 47'$ W. 534.6 feet to the southwest corner of Parcel No. 730; thence along the southerly line of said parcel, N. $59^{\circ} 00'$ E. 368 feet to the southeast corner of same, in the southerly line of Parcel No. 729; thence partly along said line, N. $59^{\circ} 00'$ E. 1294.5 feet to the southeast corner of said parcel, in the westerly line of Parcel No. 732; thence partly along said line, S. $23^{\circ} 43'$ E. 585. feet to the southwest corner of said parcel; thence along the southerly line of same, N. $63^{\circ} 08'$ E. 1074.5 feet to the most easterly point of said parcel; thence $63^{\circ} 08'$ E. 76.1 feet, S.

1422

45° 44' E. 883. feet and S. 58° 38' W. 2101.1 feet to the most northerly point of before mentioned Parcel No. 736, in the center of the before mentioned road leading from West Hurley to Glenford; thence partly along the northerly line of said parcel, S. 58° 38' W. 1120.7 feet to the point or place of beginning; containing 86.489 acres." 1423

William Sage, Jr., claims to be the owner of said premises. The sum of \$7,624.45 for land and buildings and the further sum of \$4,324.45 for reservoir availability and adaptability being a grand total of the sum of \$11,948.90, is the sum ascertained and determined by us as aforesaid, to be paid to the owners of and all persons interested in said land for the taking of the fee thereof, designated upon said map as Parcel 733, and in full satisfaction for all claims of damage sustained or which may be sustained by them by reason of the acquisition, use or occupation for the purposes indicated in said Act, or the Acts amendatory thereof or supplemental thereto of the fee and all other real estate laid down on said map. 1424

Edward A. Alexander appeared before us as attorney and counsel for said claimant. We further recommend that said claimant be allowed Five (5%) per cent. on the above award for his legal fees and expenses. All of which is respectfully submitted. 1425

Dated, New York, May 10, 1911.

GEORGE E. WELLER,
FRED. H. PARKER,
GEORGE W. BATTEN,
Commissioners of Appraisal.

1426 This Commission further recommends that the following sums be allowed to the following named witnesses according to the amount set opposite each name:

Cornelius C. Vermeule.....	\$353.33
Robert Horton.....	281.31
Peter Elbert Nostrand.....	451.93
Edwin Burhans.....	54.66
Walter Lee.....	40.06
Elmer E. Molyneaux.....	43.64
John Van Kleeck	45.00
John H. Saxe.....	45.00
Virgil H. Winchell.....	57.28

1427

\$1,372.31

Filed, May 16, 1911.

1428

Notice of Motion by Claimant for an Order Setting Aside Report of Commission. 1429

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Application of JOHN A. BENSEL, CHARLES N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York, under Chapter 724 of the Laws of 1905 and the Acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

Ashokan
Reservoir,
Section 15.
Parcel 733.

1430

WILLIAM SAGE, JR.,
Claimant,

against

THE CITY OF NEW YORK,
Petitioner.

1431

To Hon. Archibald R. Watson,
Corporation Counsel of the City of New York:

1432 Sir:

Please take notice that upon the report herein-after referred to, upon the evidence, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move the United States Circuit Court, for the Southern District of New York, at a Stated Term thereof for Motions, to be held on the 13th day of September, 1911, at 10.30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, in the Court House of said Court in Room in the Post Office Building in the Borough of Manhattan, City and County of New York, for an order setting aside the final report of Commission No. 15, composed of Hon. George E. Weller, Chairman; Hon. Fred H. Parker and Hon. George W. Batten, the Commissioners of Appraisal heretofore appointed by an order of the Supreme Court of the State of New York, Ulster County, pursuant to Chapter 724 of the Laws of 1905 and the Acts amendatory thereof and supplemental thereto, upon the ground that the award for Parcel 733 contained in said report is wholly inadequate; that the said award is contrary to the evidence before the said Commission, and is contrary to law and is so inadequate that it is shocking to the sense of justice, and on behalf of William Sage, Jr., the claimant, the undersigned upon the said motion will file detailed written objections to the said report, and will ask for such further and additional relief as may be just and lawful in the premises.

1433

The said report above referred to was heretofore filed in the office of the Clerk of this Court on the 16th day of May, 1911. The substance of the contents of the said report is as follows:

1434

That William Sage, Jr., claims to be the owner of said premises. That the sum of \$7,624.45 is awarded for the land and buildings, and the fur-

ther sum of \$4,324.45 for reservoir availability and adaptability, being the grand total of \$11,948.90, which is the sum ascertained and determined by the said Commissioners to be paid to the owners of and all persons interested in said land for the taking of the fee thereof designated upon said map as Parcel 733, and in full satisfaction for all claims and damages sustained or which may be sustained by them by reason of the acquisition, use or occupation for the purposes enacted in said Act or the Acts amendatory thereof or supplemental thereto. That Edward A. Alexander appeared before the said Commission as attorney and counsel for the claimant, and that the Commission recommended that on the aforesaid claim there be allowed 5% on the above award for legal fees and expenses, and that in addition to said sum, there be allowed the sum of \$ as witnesses' fees, the witnesses who appeared before such Commission and testified in favor of the claimant. 1435

The claimant hereby waives all advertising in newspapers, if any such advertising is required on a motion to set aside the report.

This motion is made on the aforesaid report, and on all other proceedings heretofore had in the above entitled matter, including all of the evidence taken before the aforesaid Commissioners of Appraisal, and upon all other papers or documents heretofore filed in above entitled proceeding in any wise relating to the aforesaid claim. 1436

Dated, New York, June , 1911.

Yours, etc.,

EDWARD A. ALEXANDER,
Attorney for Claimant,
165 Broadway,
Borough of Manhattan,
New York City.

Filed, October 4, 1911.

**1438 Notice of Motion by Petitioner to
Confirm Award of Commission for
Land and Buildings.**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

1439 The Application of the Board of
Water Supply of The City of
New York to acquire real
estate in the Town of Hurley,
Ulster County, etc.

WILLIAM SAGE, Jr.,
Claimant,

against

THE CITY OF NEW YORK,
Petitioner.

Ashokan
Reservoir,
Section 15,
Parcel 733.

1440

Sir:

Please take notice that upon the report of Hon. George E. Weller, Frederick H. Parker and George W. Batten, Commissioners of Appraisal in the above-entitled proceeding, heretofore made and filed with the Clerk of this Court, and upon the evidence taken by them and the pleadings and proceedings herein, and upon the other papers and documents heretofore filed in the above-entitled proceeding, including those on the motion for the ap-

pointment of a Commission herein, the petitioner, 1441
 The City of New York, will move at a Stated Term
 for Motions of this Court, to be held on the 13th
 day of September, 1911, at 10:30 o'clock in the fore-
 noon, at the Court House in the Post Office Build-
 ing, Borough of Manhattan, City of New York, for
 an order confirming so much of said report as makes
 an award of \$7,624.45 for the land and buildings
 embraced in Parcel 733.

And for such other and further relief as may be
 just and proper.

Dated New York, August 30, 1911.

Yours, etc.,

1442

ARCHIBALD R. WATSON,
 Corporation Counsel,
 Attorney for Petitioner,
 Hall of Records,
 City of New York.

To EDWARD A. ALEXANDER,
 165 Broadway,
 City of New York.

Filed October 4, 1911.

1443

**1444 Decision of Judge Lacombe Confirm-
ing Report.**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of

The Application to condemn land
in Ulster County, New York,
for Ashokan Dam and Reser-
voir.

1445

WILLIAM SAGE, Jr., Claimant.

LACOMBE, C. J.:

The proceeding affecting property of this claimant was removed to this Court by reason of diversity of citizenship.

1446 The Commissioners made an award of \$7,624.45 for the land and buildings of claimant's parcel and the further sum of \$4,024.45 for reservoir availability and adaptability. The City of New York moves to confirm the report as to the \$7,624.45 only, contending that there should be no award for reservoir availability. The claimant moves to send back on the ground that the amount awarded for reservoir availability is wholly inadequate.

So far as the latter matter is concerned, it appears that the evidence is of such a character that the Court is not disposed to disturb the conclusion reached by the Commissioners any more than it would an award of a like amount by a jury predi-

cated on such testimony. This motion is therefore **1447**
denied.

The evidence shows that the land in question, together with that of claimant's neighbors, was available as a reservoir site, and that such availability was not confined to the uses of New York City. Apparently the award is not made on the basis of the value of the reservoir lands to the City of New York alone; had such been the basis the valuation would have been very much higher. But the Commissioners have taken into consideration as an element of value the circumstance that, had New York City never gone to this watershed, some other political community or some water company created by statute might have been willing to pay more than their value as farming land for the parcels which would enable it to impound water there. Under *Boom Co. v. Patterson*, 98 U. S., 403, this was a proper method of determining value.

1448

An interesting point is raised: Whether since the decisions of the State Courts are not in accord with those of the Federal Courts on that subject (*In re Ashokan Reservoir*, 130 App. Div. 350, 352, 357, of which the McGovern claim was affirmed by the New York Court of Appeals without opinion) comity should not require the latter courts to follow State decisions. This question is about to be presented to the United States Supreme Court in the McGovern case which has been taken to that tribunal. In view of this circumstance it is unnecessary to discuss that question here. The principle laid down here in *Boom Co. v. Patterson*, *supra*, will be followed and the entire report of the Commissioners confirmed. Presumably before this decision comes up for review at the next term of the U. S. Circuit Court of Appeals a decision of the United States Supreme Court (in the McGovern case) will dispose of the question.

1449

Report as to claimant's parcel is confirmed.

Filed Oct. 4, 1911.

1450 Order Confirming Award of Commission.

At a Stated Term of the United States Circuit Court, for the Southern District of New York, held in and for the said District, at the Court House, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 2nd day of November, 1911.

Present—Hon. E. HENRY LACOMBE, Justice.

1451

In the Matter
of

The Application and Petition of JOHN A. BENSEL, CHARLES N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York, under Chapter 724 of the Laws of 1905, and the Acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

1452

Ashokan
Reservoir,
Parcel No. 733,
Section 15.

THE CITY OF NEW YORK,
Petitioner,

VS.

WILLIAM SAGE, JR.,
Claimant.

1453

A motion on behalf of William Sage, Jr., the claimant in the above entitled proceeding pending in this Court, to set aside an award made to him by George E. Weller, Frederick H. Parker and George W. Batten, Commissioners of Appraisal of this Court, as wholly inadequate, and contrary to law, and for other relief, coming duly on to be heard, and

1454

A motion on behalf of the City of New York in the above entitled proceeding, to confirm the aforesaid report in so far as the said report awards to the said claimant for land and buildings, the sum of seven thousand six hundred and twenty-four and 45/100 (\$7,624.45) dollars, and to disallow and reject so much of the said award as allowed the additional sum of four thousand three hundred and twenty-four and 45/100 (\$4,324.45) dollars to the claimant for reservoir availability and adaptability, coming duly on to be heard before this Court on the 27th day of September, 1911, at 10:30 o'clock in the forenoon on said day, and

1455

Both of the aforesaid motions having come duly and regularly on to be heard after due notice, and having been argued by counsel, and heard by the Court, together, and

It appearing that the aforementioned Commissioners of Appraisal were appointed Commissioners in the above entitled matter by an order of the New York State Supreme Court, dated the 22nd day of May, 1909, and then entered in the office of

- 1456 the Clerk of the said New York State Supreme Court of Ulster County, to estimate, ascertain and appraise the compensation to be made to the owners, or any and all persons interested in the real estate shown on a map in the above entitled proceeding, then pending in the said State Court, which map had been filed in the office of the Clerk of the County of Ulster on the 4th day of March, 1908, as map No. as proposed to be taken, acquired or affected, for the purpose indicated in Chapter 724 of the Laws of 1905 of the State of New York, and the Acts amendatory thereof, and to exercise and discharge all the powers and duties conferred on such Commissioners by said Acts, and without unnecessary delay to ascertain and determine the compensation which ought justly to be made by the City of New York to the owners or persons interested in the real estate, or any right, title, interest, term, easement or privilege pertaining thereto, sought to be acquired or extinguished by the said proceeding, and to any owners or persons interested in the real estate contiguous or adjacent thereto, in any way affected by the taking of such real estate, or the taking or extinguishment of any interest therein, whether such adjacent or contiguous real estate was shown on the said map or not;
- 1457

- 1458 Whereas, it appears that on the 22nd day of May, 1909, the aforesaid Commissioners of Appraisal, who, on the said date, were Commissioners of Appraisal of the said New York State Supreme Court, took and subscribed the oath required by the said State Constitution; that the said meeting of such Commission was held at the said State Court House, in the City of Kingston, on or about the 27th day of May, 1909, at 10.30 o'clock in the forenoon, as directed by the order of the said State Supreme Court; that on the 27th day of May, 1909, the oaths

of the said Commissioners of Appraisal were duly filed in the office of the Clerk of the County of Ulster, in the State of New York, and a certified copy thereof was duly filed in the office of the Clerk of the County of New York on the 28th day of May, 1909, as required by the laws of the State of New York. 1459

And it further appearing that the said Commission viewed the real estate laid down on the aforesaid map, including Parcel No. 733, and carefully examined each parcel shown thereon;

And it appearing that thereafter, and on or about April 29th, 1910, the above named claimant, William Sage, Jr., petitioned the said State Supreme Court for an order removing the aforesaid proceeding, then pending, in so far as his rights were concerned, by reason of the City of New York having taken Parcel No. 733, which at said time was, and prior thereto had been, owned by him in fee, from the said State Court to the United States Circuit Court, for the Southern District of New York, upon the ground of diversity of citizenship, and that the amount involved was more than five thousand (\$5,000) dollars, and it appearing that on April 29th, 1910, an order was duly made and entered by the said State Supreme Court, upon the said claimant's petition, and an undertaking given by him which was duly approved, all of which was in full compliance with the United States Removal Statutes, removing the said proceeding from the said State Court to this Court. 1460

And it further appearing that on May 7th, 1910, a copy of the aforesaid petition and order of removal, together with notice of entry thereof, and a copy of the aforesaid undertaking, with due and proper approval, together with notice of filing thereof, were duly served upon the Corporation Counsel of the City of New York, and it appearing 1461

1462 that on May 26th, 1910, certified copies of the aforesaid petition, order and undertaking, with approval, for removal, of petition for the appointment of Commissioners of Appraisal, of the oaths of the said Commissioners of Appraisal, of the order appointing said Commissioners of Appraisal, were duly filed in the office of the Clerk of this Court, and that Edward A. Alexander duly appeared for this claimant, as his attorney, and entered his appearance in the Rule Book of this Court.

1463 And it further appearing that thereafter, and on or about October 11th, 1910, the claimant herein served notice of motion for the appointment of Commissioners of Appraisal by this Court in this proceeding, which had then been removed, in so far as this claimant's rights are concerned, from the said State Court to this Court, and the said motion to have this Court appoint Commissioners of Appraisal in the said proceeding having been argued on October 28th, 1910,

1464 And it further appearing that on October 29th, 1910, the City of New York, through its Corporation Counsel, made a motion, upon due and proper service of notice of motion and affidavits, to remand the above entitled proceeding to the said State Court, and the foregoing motion to appoint Commissioners of Appraisal and to remand the above entitled proceeding to said State Court, having come on to be heard before the Honorable Walter C. Noyes,

And it appearing that the said motions were argued together at a Stated Term of this Court, held in the Court House thereof, in the Post Office Building, on November 11th, 1910, and this Court having denied the motion of the said City of New York to remand this proceeding to the said State Court, and an order denying the said motion to remand having been duly entered in the office of the

Clerk of this Court on the 11th day of January, 1911, and a certified copy of the said order denying the motion of the said City of New York to remand the above entitled proceeding to the said State Court having been duly served on the aforesaid Commission on January 12th, 1911, 1465

And it appearing that after hearing all of the evidence, testimony, proofs and allegations of the claimant and of the City of New York, the said Commission duly made and filed its written report, as required by law, in the office of the Clerk of this Court on the 16th day of May, 1911, wherein and whereby it awarded to this claimant the sum of seven thousand six hundred and twenty-four and 45/100 (\$7,624.45) dollars, for the land and buildings constituting Parcel No. 733, and the further sum of four thousand three hundred and twenty-four and 45/100 (\$4,324.45) dollars for reservoir availability and adaptability, being the grand total of eleven thousand nine hundred and forty-eight and 90/100 (\$11,948.90) dollars, which was the sum ascertained and determined by the said Commission to be paid to the owners of and all persons interested in the said land, Parcel No. 733, for the taking in fee thereof and in full satisfaction of all claims and damages sustained, or which may be sustained by them by reason of the acquisition, use or occupation, for the purposes enacted in Chapter 724 of the Laws of 1905 of the State of New York, and of the Acts amendatory thereof or supplemental thereto. 1466

And it further appearing that the testimony taken by the said Commission was filed with their report and that they have annexed thereto a true copy of so much of the aforesaid map as shows the parcel reported on, 1467

And it further appearing that after hearing this claimant's claim, evidence, proofs, allegations and

- 1468 testimony, and making a view and examination of Parcel No. 733 and after carefully considering the same, they did, without unnecessary delay, ascertain and determine the compensation which ought justly to be made by the City of New York to this claimant for so much as is included in the said report, of the real estate sought to be acquired or affected by this proceeding, and after hearing Walter C. Sheppard, Esq., of counsel for the City of New York, in favor of confirming the said report in part, as aforesaid, and rejecting the valuation placed by the said Commission for reservoir availability and adaptability, and after hearing Edward A. Alexander, Esq., of counsel for the claimant, in favor of setting aside the said report on the grounds set forth in the aforementioned motion to set the same aside, and the said motion of the claimant to set the said report aside having been denied, and the said motion of the City of New York to confirm a part of the said report and to reject the other part as aforesaid having been denied,

And it appearing that a brief description of Parcel No. 733, here reported on, as taken or affected by this proceeding, is as follows:

- 1470 "BEGINNING at the northwest corner of Parcel No. 736, in the easterly line of Parcel No. 735, and running thence partly along said line, N. 29 degrees, 39 minutes W. 613.9 feet to the most southerly point of parcel No. 734; thence along the easterly line of said parcel, N. 24 degrees, 33 minutes E. 354.8 feet to the northeast corner of same, in the centre of a road leading from West Hurley to Glenford; thence along the centre line of said road, and partly along the northerly line of said parcel, N. 64 degrees, 02 minutes, W. 124 feet to the most northerly point of said parcel, in the before mentioned

easterly line of Parcel No. 735; thence partly 1471
 along said line, and continuing along the centre line of said road N. 42 degrees, 35 minutes W. 85.6 feet and N. 26 degrees, 47 minutes W. 534.5 feet to the southwest corner of Parcel No. 730; thence along the southerly line of said parcel, N. 59 degrees, 00 minutes E. 368 feet to the southeast corner of same, in the southerly line of Parcel No. 729; thence partly along said line, N. 59 degrees 00 minutes E. 1294.5 feet to the southeast corner of said parcel, in the westerly line of Parcel No. 732; thence partly along said line S. 23 degrees, 43 minutes E. 585 feet to the southeast corner of said parcel; thence along the southerly line of same, N. 63 degrees 08 minutes E. 1074.5 feet to the most easterly point of said parcel; thence N. 63 degrees, 08 minutes, E. 76.1 feet, S. 45 degrees, 44 minutes, E. .883 feet and S. 58 degrees, 38 minutes W. 2101.1 feet to the most northerly point of before-mentioned parcel No. 736, in the centre of the before-mentioned road leading from West Hurley to Glenford; thence partly along the northerly line of said parcel, S. 58 degrees, 38 minutes W. 1120.7 feet to the point or place of Beginning; containing 86.489 acres." 1472

Now, on motion of Edward A. Alexander, counsel for William Sage, Jr., the claimant in the above entitled proceeding, it is 1473

Ordered that the motion of the claimant to set aside the report of the said Commission, dated May 16th, 1911, and duly filed in the office of the Clerk of this Court on the said date, is hereby denied.

And it is further ordered that the motion of the City of New York to confirm part of the said report of the said Commission and to reject so much

1474 thereof as allows the claimant four thousand three hundred and twenty-four and 45/100 (\$4,324.45) dollars for reservoir adaptability and availability, be and the same hereby is denied.

And it is further ordered that the said report of the said Commission be and the same hereby is in all respects ratified, approved and confirmed.

And it is further ordered that the amount of claimant's expenses and disbursements, including reasonable compensation for witnesses and counsel fee, be made the subject of a separate and further order.

1475 And it is further ordered that the respective amounts of compensation, ascertained and determined by the said Commission and fixed by their report as aforesaid be paid by the Comptroller of the City of New York, with interest thereon as required by law, to the person or persons respectively entitled thereto.

Enter,

E. HENRY LACOMBE,
U. S. Circuit Judge.

Filed November 2, 1911.

1476

Order for Allowances for Counsel 1477
Fees and Expenses.

At a stated Term of the United States
 Circuit Court, for the Southern
 District of New York, held in and
 for the said District, at the Court
 House, in the Post Office Build-
 ing, in the Borough of Manhat-
 tan, City of New York, on the
 2nd day of November, 1911.

Present—Hon. E. HENRY LACOMBE, Justice.

In the Matter
 of

1478

The Application and Petition of
 JOHN A. BENSEL, CHARLES N.
 CHADWICK and CHARLES A.
 SHAW, constituting the Board
 of Water Supply of the City of
 New York, to acquire real es-
 tate for and on behalf of the
 City of New York, under Chap-
 ter 724 of the Laws of 1905,
 and the Acts amendatory there-
 of, in the Town of Hurley, Ul-
 ster County, New York, for the
 purpose of providing an addi-
 tional supply of pure and
 wholesome water for the use of
 the City of New York,

Ashokan
 Reservoir,
 Parcel No. 733,
 Section 15.

1479

THE CITY OF NEW YORK,
 Petitioner,

VS.

WILLIAM SAGE, JR.,
 Claimant.

1480

A motion on behalf of William Sage, Jr., the claimant in the above entitled proceeding pending in this Court, to set aside an award made to him by George E. Weller, Frederick H. Parker and George W. Batten, Commissioners of Appraisal of this Court, as wholly inadequate, and contrary to law, and for other relief, coming duly on to be heard, and

1481

A motion on behalf of the City of New York in the above entitled proceeding, to confirm the aforesaid report in so far as the said report awards to the said claimant for land and buildings, the sum of seven thousand six hundred and twenty-four and 45/100 (\$7624.45) dollars, and to disallow and reject so much of the said award as allowed the additional sum of four thousand three hundred and twenty-four and 45/100 (\$4324.45) dollars, to the claimant for reservoir availability and adaptability, coming duly on to be heard before this Court on the 27th day of September, 1911, at 10:30 o'clock in the forenoon on said day, and

Both of the aforesaid motions having come duly and regularly on to be heard after due notice, and having been argued by counsel, and heard by the Court together, and

1482

It appearing that an order in the above entitled proceeding was duly made and entered in the office of the Clerk of this Court on the day of October, 1911, confirming in all respects the award and report of the aforesaid commissioners of appraisal, and applications for allowance and for fees and disbursements having come before me at several successive adjournments and arguments heard hereon.

It further appearing that Edward A. Alexander, the attorney and counsel for William Sage, Jr., the claimant herein, had appeared before the aforesaid Commission as attorney and counsel for the said claimant on a great many days, as shown by the

record of evidence and testimony taken before the said commission, which is made a part of their report, and that the said commission recommended that the aforesaid claimant should be allowed five (5%) per cent. of the amount of the above award for legal fees and expenses, and 1483

It further appearing that it has been the practice, usage and custom of the Supreme Court of the State of New York, to allow five (5%) per cent. to claimants, whose property is taken from them in condemnation proceedings, under Chapter 724 of the Laws of 1905 of the State of New York, and the acts amendatory thereof and supplemental thereto, and

It further appearing that in this case intricate and complicated questions both of law and of fact were involved, and that the said case required a long time in the preparation and trial thereof, and 1484

It further appearing that the said commission after hearing counsel for the claimant, and counsel for the City of New York, allowed to the claimant one thousand three hundred and seventy-two and twenty-one (\$1,372.21) dollars, as witness fees to the witnesses who appeared before such commission, and testified in favor of the claimant, and

It further appearing that the said commission determined that all of the said witness fees were necessary and reasonable, after a full hearing of all matters relating to the said witness fees, and in which counsel on both sides participated, and 1485

It further appearing that the testimony taken by said commission was filed with their report,

Now, on motion of Edward A. Alexander, counsel for William Sage, Jr., claimant in the above entitled proceeding, it is

Ordered that the Comptroller of the City of New York pay to the claimant as and for counsel fees, ascertained and determined by said commission and

1486 fixed by their report, five (5%) per cent. of the amount of the award herein, being five (5%) per cent. of eleven thousand, nine hundred and forty-eight and 90/100 (\$11,948.90) dollars, or the sum of five hundred and ninety-seven and 44/100 (\$597.44) dollars, and it is

Further ordered that the Comptroller of the City of New York pay to the claimant, the sum of one thousand three hundred and seventy-two and 21/100 (\$1,372.21) dollars, being the reasonable compensation for claimant's witnesses, which the said commission, after a full hearing ascertained and determined to be fair and reasonable compensation for the claimant's witnesses and other expenses, and which was fixed by the said commission in their report, which said report was confirmed in all respects by an order of this Court heretofore entered herein.

1487

Enter,

E. HENRY LACOMBE,
U. S. Circuit Judge.

Filed November 2, 1911.

1488

Affidavit of Jerome H. Buck as to 1489
Practice in Ulster County of In-
cluding in One Order Awards and
Allowances for Expenses and
Counsel Fees.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK,

In the Matter

of

The Application of the BOARD OF
 WATER SUPPLY OF THE CITY OF
 NEW YORK to acquire certain
 lands in the towns of Olive,
 Marbletown and Hurley, for
 the purposes of providing an
 additional supply of pure and
 wholesome water for the City
 of New York.

1490

WILLIAM SAGE, JR.,
 Claimant,
 against

THE CITY OF NEW YORK,
 Petitioner.

1491

State of New York, }
 County of New York, } ss.:

Jerome H. Buck, being duly sworn, deposes and
 says:

I am an attorney and counsellor-at-law, duly ad-

1492 mitted to practice in the Courts of the State of New York, and also in the United States Circuit Court for the Southern District of New York.

That since 1907, when proceedings were commenced in Ulster County under Chapter 724 of the Laws of 1905, and the acts amendatory thereof, under which this proceeding was instituted, I have been conversant with the condemnation proceedings instituted under the said Laws in Ulster County and have thoroughly familiarized myself with the same and have followed the cases decided by the Courts and the opinions handed down and the practice pursued. That I have been personally interested in over thirty of these proceedings as either attorney, counsel or claimant and I have appeared before the Commissioners of Appraisal and tried numerous cases and have also appeared before the Supreme Court of the State of New York on motions to confirm reports and have also been attorney in several of these proceedings which were appealed.

That the practice in Ulster County has been to include in one order the awards and allowances for counsel fees and the allowance for expenses and witness fees. That the only exceptions to this practice that I know of have been in cases where the Corporation Counsel has objected to the allowance for counsel fees or witness fees or to both, and in these cases, the practice has not been uniform. In some cases where the objections were overruled, the same were included in the order of confirmation and in other cases separate orders were made for the allowances for witness fees and counsel fees. That in the last order which affects Section 1, Ashokan Reservoir, Ulster County, and which was served upon me on August 22, 1911, and which was entered by the Corporation Counsel confirming the awards made by the Commissioners, there was included the awards for the land taken made by the Commission-

ers of Appraisal and also allowances for counsel fees and also allowances for witness fees. This order recites on its face that the Corporation Counsel objected to one of the allowances and the objection was overruled. **1495**

I further desire to state that from my knowledge of the proceedings, it has been the exception when separate orders have been entered for allowances for counsel fees and witness fees.

I further desire to state that I have no financial interest in this matter and am simply making this affidavit at the request of the attorney for the claimant.

(Signed) **JEROME H. BUCK.** **1496**

Sworn to before me this 21st}
day of October, 1911. }

F. K. WATERS,
Commissioner of Deeds for
The City of New York.

Filed, October 27, 1911.

1498

Assignment of Errors.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

1499

The Application and Petition of
 JOHN A. BENSEL, CHARLES N.
 CHADWICK and CHARLES A.
 SHAW, constituting the Board
 of Water Supply of the City of
 New York, to acquire real
 estate for and on behalf of the
 City of New York, under Chap-
 ter 724 of the Laws of 1905,
 and the Acts amendatory there-
 of, in the Town of Hurley, Ul-
 ster County, New York, for the
 purpose of providing an addi-
 tional supply of pure and
 wholesome water for the use of
 the City of New York.

1500

THE CITY OF NEW YORK,
 Petitioner,

vs.

WILLIAM SAGE, JR.,
 Claimant.

Ashokan
 Reservoir,
 Parcel No. 733,
 Section 15.

Now comes The City of New York, the petitioner

herein, by Archibald R. Watson, its Corporation Counsel, and says in the record and proceedings in the above entitled proceeding there is manifest error, which occurred in the removal of this proceeding from the State Court to the United States Court; in the proceedings in this Court had on said removal; in the proceedings had before the Commissioners of Appraisal, and in the further proceedings thereon in this Court, to wit:

I. That the Court erred in removing this proceeding from the State Court to the United States Court.

II. That the Court erred in holding that there was evidence before the Commissioners of Appraisal of any value for reservoir availability and adaptability except to the condemning party, The City of New York.

III. That the Court and the Commission erred in holding that the claimant is not entitled to compensation, both for reservoir availability and adaptability, and for the value of the farm buildings and quarry; and that these two values are not contradictory, and that the claimant is entitled to the sum of contradictory values.

IV. That the award is grossly excessive.

V. That in arriving at their award the Commissioners of Appraisal proceeded on an erroneous theory.

VI. That the award of the Commissioners of Appraisal in the Catskill Water Supply proceedings cannot be confirmed until a motion for confirmation is duly made, and that no motion for the confirmation of that part of the award as to reservoir availability and adaptability was made by either party.

VII. That the claimant in this proceeding took

1504 the property subject to the rule as laid down by the highest court of the State of New York, and that it was error to make an award in disregard of that rule.

VIII. That the only question before the Court was whether the report should be rejected *in toto* or the land and building value confirmed and the rest of the report rejected, and that the Court erred in confirming the whole report.

1505 IX. That the Court erred in holding that the rule laid down in *Boon Co. vs. Patterson*, 98 U. S. 403, applied to this parcel in this proceeding, and was the proper method of determining value, and that if said rule did apply, the Commissioners of Appraisal herein erred in that they did not follow it.

Wherefore the said City of New York, the petitioner herein, and the petitioner in error, prays that the judgment and order herein for the errors aforesaid and for the other errors in the record and proceedings aforesaid, may be reversed and annulled and altogether held for nothing, and that the petitioner in error may be restored to all things which it has lost by reason of said judgment and order.

Dated, New York, December 7th, 1911.

1506

ARCHIBALD R. WATSON,
Corporation Counsel,
Attorney for Petitioner in Error,
The City of New York,
Office and Post Office Address, Hall of Records,
Borough of Manhattan,
New York City.

Filed December 14, 1911.

Assignment of Errors.

1507

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of

The Application and Petition of
JOHN A. BENSEL, CHARLES N.
CHADWICK and CHARLES A.
SHAW, constituting the Board
of Water Supply of The City
of New York, to acquire real
estate for and on behalf of The
City of New York, under Chap-
ter 724 of the Laws of 1905 and
the Acts amendatory thereof,
in the Town of Hurley, Ulster
County, New York, for the pur-
pose of providing an additional
supply of pure and wholesome
water for the use of The City
of New York.

Ashokan
Reservoir,
Parcel 733,
Section 15.

In re Order Di-
recting Pay-
ment of Ex-
penses, Dis-
bursements,
Witness Fees
and Counsel
Fees.

1508

THE CITY OF NEW YORK,
Petitioner,
against

WILLIAM SAGE, Jr.,
Claimant.

1509

Now comes The City of New York, the petitioner
herein, by Archibald R. Watson, its Corporation

1510 Counsel, and says in the record and proceedings in the above-entitled proceeding there is manifest error which occurred in the removal of this proceeding from the State Court to the United States Court; in the proceedings in this Court had on said removal; in the proceedings had before the Commissioners of Appraisal, and in the further proceedings thereon in this Court, to wit:

I. That the Court erred in removing this proceeding from the State Court to the United States Court.

1511 II. That the Court erred in holding that there was evidence before the Commissioners of Appraisal of any value for reservoir availability and adaptability except to the condemning party, The City of New York.

III. That the Court and the Commission erred in holding that the claimant is not entitled to compensation, both for reservoir availability and adaptability, and for the value of the farm buildings and quarry; and that these two values are not contradictory and that the claimant is entitled to the sum of contradictory values.

IV. That the award is grossly excessive.

1512 V. That in arriving at their award the Commissioners of Appraisal proceeded on an erroneous theory.

VI. That the award of the Commissioners of Appraisal in the Catskill water supply proceedings cannot be confirmed until a motion for confirmation is duly made, and that no motion for the confirmation of that part of the award as to reservoir availability and adaptability was made by either party.

VII. That the claimant in this proceeding took

the property subject to the rule as laid down by the highest court of the State of New York, and that it was error to make an award in disregard of that rule. 1513

VIII. That the only question before the Court was whether the report should be rejected *in toto* or the land and building value confirmed and the rest of the report rejected and that the Court erred in confirming the whole report.

IX. That the Court erred in holding that the rule laid down in *Boon Co. vs. Patterson*, 98 U. S. 403, applied to this parcel in this proceeding, and was the proper method of determining value, and that if said rule did apply, the Commissioners of Appraisal herein erred in that they did not follow it. 1514

Wherefore the said City of New York, the petitioner herein, and the petitioner in error, prays that the judgment and order herein for the errors aforesaid and for the other errors in the record and proceedings aforesaid, may be reversed and annulled and altogether held for nothing, and that the petitioner in error may be restored to all things which it has lost by reason of said judgment and order.

Dated New York, December 7th, 1911.

ARCHIBALD R. WATSON,
Corporation Counsel of the City
of New York,
Attorney for Petitioner. 1515

Filed December 14, 1911.

1516

Citation.

By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit:

To William Sage, Jr.:

Greeting:

1517

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 3rd day of January, 1912, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein The City of New York is petitioner in error, and you are claimant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

1518

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 14th day of December, in the year of our Lord one thousand nine hundred and eleven, and the Independence of the United States the one hundred and thirty-sixth.

E. HENRY LACOMBE,
Judge of the Circuit Court of the
United States for the Southern
District of New York, in the Sec-
ond Circuit.

Copy received Dec. 15th, 1911.

EDWARD A. ALEXANDER,
Attorney for Claimant.

Filed Dec. 15, 1911.

Citation.**1519**

By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To William Sage, Jr.

Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 3rd day of January, 1912, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein The City of New York is petitioner in error and you are claimant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

1520

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 14th day of December, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-sixth.

1521

E. HENRY LACOMBE,
Judge of the Circuit Court of the
United States for the Southern
District of New York, in the
Second Circuit.

Copy received Dec. 15, 1911.

EDWARD A. ALEXANDER,
Attorney for Claimant.

Filed Dec. 15, 1911.

1522

Clerk's Certificate.

United States of America,)
 Southern District of New York,) ss.:

1523

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the pages numbered from one to _____, inclusive, contain a true and complete transcript of the record and proceedings had in said Court as per designation filed Dec. 26, 1911, in the cause entitled In the Matter of the Application and Petition of John A. Bense, Charles N. Chadwick and Charles A. Shaw, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of The City of New York under Chapter 724 of the Laws of 1905 and the acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of The City of New York. The City of New York, Petitioner, against William Sage, Jr., Claimant (two appeals), as the same remain of record and on file in said office.

1524

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this _____ day of May, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-sixth.

(Seal)

THOMAS ALEXANDER,
 Clerk.

UNITED STATES CIRCUIT COURT OF 1525
APPEALS,

FOR THE SECOND CIRCUIT.

IN THE MATTER

OF

The Application of JOHN A. BENSEL,
CHARLES N. CHADWICK and CHARLES
A. SHAW, constituting the Board of
Water Supply of The City of New
York, to acquire real estate for and
on behalf of The City of New York,
under Chapter 724 of the Laws of
1905 and the Acts amendatory
thereof in the Town of Hurley,
Ulster County, New York, for the
purpose of providing an additional
supply of pure and wholesome water
for the use of The City of New York.

1526

WILLIAM SAGE, JR.,
Claimant-Appellee,

AGAINST

THE CITY OF NEW YORK,
Petitioner-Appellant.

IT IS STIPULATED that the order denying the 1527
motion to remand the above-entitled proceeding,
made, entered and filed in the office of the Clerk of
the United States Circuit Court, now the United
States District Court, on the 3rd day of January,
1911, and that the affidavits of William Sage, Jr.,
the claimant-appellee herein, duly verified by him
on November 2nd, 1910, and November 9th, 1910,
which were before the Hon. Walter C. Noyes, upon
his decision of the motion for the appointment of
commissioners and the motion to remand annexed

1528 hereto be added to and printed as a part of the transcript of record on appeal in the above-entitled proceeding.

Dated, New York, May 21, 1912.

So ordered.

E. H. LACOMBE.

ARCHIBALD R. WATSON,
Attorney for Plaintiff in Error.

EDWARD A. ALEXANDER,
Attorney for Defendant in Error.

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At a Stated Term of the Circuit Court 1531
of the United States for the Southern
District of New York, held in said
District at the United States Court
House in the Post Office Building in
the Borough of Manhattan, in the said
Southern District of New York on the
3rd day of January, 1911.

Present—HON. WALTER C. NOYES,
United States Circuit Judge.

IN THE MATTER

OF

The Application of JOHN A. BENSEL,
CHARLES N. CHADWICK and CHARLES
A. SHAW, constituting the Board of
Water Supply of The City of New
York, to acquire real estate for and
on behalf of The City of New York,
under Chapter 724 of the Laws of
1905 and the Acts amendatory
thereof in the Town of Hurley,
Ulster County, New York, for the
purpose of providing an additional
supply of pure and wholesome water
for the use of The City of New York.

Ashokan
Reservoir,
Section
15,
Parcel
733.

1532

WILLIAM SAGE, JR.,
Claimant,

AGAINST

THE CITY OF NEW YORK,
Petitioner.

1533

A motion having been regularly made by the
above-named petitioner in the above-entitled pro-
ceeding and having come regularly on to be heard
before this Court at a Stated Term thereof, at the
Court House in the Post Office Building in the

1534 Borough of Manhattan, City, County and State of New York on the 11th day of November, 1910, for an order remanding the above-named proceeding to the Supreme Court of the State of New York, Ulster County, from which Court said proceeding so far as affects the claim of the above-named William Sage, Jr., had been duly removed to this Court by order of said Supreme Court, duly made and entered in the office of the Clerk thereof in the County of Ulster on the 29th day of April, 1910,

Now, after reading and filing the notice of motion dated October 29, 1910, and the affidavit of
 1535 Louis C. White, verified the 28th day of October, 1910, and of Edward A. Alexander and William Sage, Jr., and after hearing Archibald R. Watson, Corporation Counsel of The City of New York, by William McM. Speer, in favor of said motion to remand, and Edward A. Alexander, attorney for William Sage, Jr., the claimant herein, in opposition to said motion, and due deliberation being had, it is

ORDERED, that said motion be and the same hereby is denied.

(Sd) WALTER C. NOYES,
 U. S. Circuit Judge.

UNITED STATES CIRCUIT COURT,

1537

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER
OF

The Application of JOHN A. BENSEL,
CHARLES N. CHADWICK and CHARLES
A. SHAW, constituting the Board of
Water Supply of the City of New
York, to acquire real estate for and
on behalf of the City of New York
under Chapter 724 of the Laws of
1905 and the acts amendatory there-
of in the Town of Hurley, Ulster
County, New York, for the purpose
of providing an additional supply
of pure and wholesome water for the
use of the City of New York,

Ashokan
Reservoir,
Section
#15,
Parcel
#733.

1538

WILLIAM SAGE, Jr.,
Claimant,

AGAINST
THE CITY OF NEW YORK,
Petitioner.

UNITED STATES OF AMERICA,
State of New York,
Southern District of New York,
County of New York,

} ss. :

1539

WILLIAM SAGE, JR., being duly sworn, deposes
and says: That he resides at 165 Cleveland Street,
Orange, in New Jersey, and that he has resided
there with his family for four years from June,
1906, and now resides there. His family consists
of his wife and two children. He is forty-five years
old and ever since the age of thirty-nine continu-
ously has been and is a citizen and resident of the
State of New Jersey. That on May 17th, 1909, I
purchased a piece of property in Ulster County,

1540 New York State for \$4,500.00 in cash from one Solomon T. Delee. That I paid in cash for the said property and that I owned the said property until the City of New York acquired title thereto by virtue of the power of eminent domain. In purchasing the said property, I purchased the same in good faith and was the absolute owner of the said property, legally, beneficially and otherwise. No one but myself from the time of the purchase of the said property, had any right, title or interest in the said property or in any part thereof. From the time the City of New York acquired title thereto I had and now have a claim against the City of New York, for the damages which I sustained by reason of the taking of said property by the City of New York and I am now the owner of the said claim for damages and no one has any right, title or interest in or to the said claim or in or to any of the proceeds which may be paid by the City of New York, in payment or satisfaction of the said claim and I do not intend to divide any of the said proceeds arising from my prosecution of the said claim with any one, but I will own the said proceeds as and for my own property. In purchasing the said property, I did not act in collusion with any one. I purchased the said property in good faith and there has been no collusion between me and any one else in any shape, sense, manner or form. I retained Edward A. Alexander, as my attorney to prosecute this claim because he is familiar with these proceedings. The property which I purchased consists of about eighty-six acres of land, together with the buildings and improvements thereon.

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WILLIAM SAGE, JR.

Sworn to before me this 2nd }
day of November, 1910. }

EDWIN HORWITZ,
Comm. of Deeds,
N. Y. City.

UNITED STATES CIRCUIT COURT,

1543

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

The Application of JOHN A. BENSEL,
CHARLES N. CHADWICK and CHARLES
A. SHAW, constituting the Board of
Water Supply of the City of New
York, to acquire real estate for and
on behalf of the City of New York
under Chapter 724 of the Laws of
1905 and the acts amendatory there-
of in the Town of Hurley, Ulster
County, New York, for the purpose
of providing an additional supply
of pure and wholesome water for the
use of the City of New York,

Ashokan
Reservoir,
Section
#15,
Parcel
#733.

1544

WILLIAM SAGE, Jr.,
Claimant,

AGAINST

THE CITY OF NEW YORK,
Petitioner.

UNITED STATES OF AMERICA,
State of New York,
City and County of New York,
Southern District of New York, } ss.:

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WILLIAM SAGE, JR., being duly sworn, deposes and says: That he is the claimant in the above-entitled proceeding, and he is not now, nor has he ever been, a party to a group of speculators, known in Kingston as "The Syndicate," nor has he any connection with the said speculators or Syndicate, if any such exists. He purchased parcel No. 733 for four thousand, five hundred dollars, in good faith. He believes that William McMutrie Speer and Louis C. White, Special Counsel for the

1546 City of New York, have referred to a Legislative investigating committee and to the speculators and the Syndicate, for the purpose of attempting to prejudice this Court against him, as he can see no other reason for making such statements in a judicial proceeding.

WILLIAM SAGE, JR.

Sworn to before me this 9th }
day of November, 1910. }

ALICE W. PARSONS,

Notary Public, Kings Co.

Cert. filed in N. Y. Co.

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UNITED STATES CIRCUIT COURT OF
APPEALS

FOR THE SECOND CIRCUIT.

No. 68—October Term, 1912.

Argued November 14, 1912. Decided July 15, 1913.

In the Matter
of

The Application and Petition of JOHN A. BENSEL, CHARLES N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York, under Chapter 724 of the Laws of 1905, and the Acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

THE CITY OF NEW YORK,
Plaintiff-in-Error,
(Petitioner)

against

WILLIAM SAGE, JR.,
Defendant-in-Error,
(Claimant below).

In Error to the
Circuit Court of
the United States
for the Southern
District of
New York.

Before—Coxe
and Ward, Cir-
cuit Judges,
and Holt,
District Judge.

On writ of error to the Circuit Court of the United States for the Southern District of New York to review a judgment confirming awards made

1552 by Commissioners of Appraisal for certain land, known as Parcel No. 733, Section 15, Ashokan Reservoir, owned by William Sage, Jr. The Commissioners allowed him \$7,624.45 for the land and buildings thereon and the further sum of \$4,324.45 for reservoir availability and adaptability, amounting in the aggregate to \$11,948.90, with five per cent. on the total amount to cover counsel fees and expenses.

The Plaintiff-in-Error also seeks to review an order made by the Circuit Court refusing to remand the proceedings to the Supreme Court of the State of New York held in and for Ulster County.

1553 The argument in this court took place on November 14, 1912, but the decision was withheld pending the action of the Supreme Court in *McGovern vs. The City of New York*, previously argued. The decision in the McGovern case was announced June 9, 1913.

ARCHIBALD R. WATSON, WILLIAM McM. SPEER and LOUIS C. WHITE, for Plaintiff-in-Error.

EDWARD A. ALEXANDER, for Defendant-in-Error.

COXE, J.:

1554 Two principal questions are involved in this review:

First. Were the condemnation proceedings properly removed to this court?

Second. Were the commissioners and the court in error in adding to the sum awarded for the value of the land and buildings, viz., \$7,624.45, the further sum of \$4,324.45 for reservoir availability and adaptability?

We think the proceedings were properly removed to this court and that the motion to remand to the State Court was properly denied.

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William Sage, Jr., the claimant and defendant-in-error, was at the time of the commencement of the proceedings to condemn his property and since has been a citizen of New Jersey, residing at Orange, Essex County, in that State. The City of New York is a municipal corporation created by the State of New York and the members of the Board of Water Supply of the city are all citizens and residents of New York. We have, then, a controversy which is wholly between citizens of different states and we see no reason why it was not removable on April 29, 1910, to the Circuit Court of the United States for the Southern District of New York. It is urged that Sage did not obtain title to the land in question until May 17, 1909, when the deed to him was executed and that proceedings to condemn the land had been instituted prior to this date. This argument rests upon the contention that the proceedings to acquire the land in question were commenced when maps were filed in the Clerk's office of Ulster County and notices posted on the property and published in newspapers. We are convinced that the proceeding was not commenced until the petition had been actually filed in the state court and this was done after the deed to Sage had been executed and recorded. As pointed out by Judge Noyes, the filing of maps and the publishing of notices did not commence any legal proceedings, but at best indicated an intention so to do. That intention might be abandoned or modified and no actual proceeding to acquire the land in question was commenced until the petition was filed.

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The only reason urged for remanding the case in the brief of the plaintiff-in-error is that the land in

1558 question was transferred to a non-resident for the purpose of creating jurisdiction in the Federal Courts. Neither fraud nor collusion is charged, but it is asserted that after the State Court had obtained jurisdiction the controversy was removed for the sole purpose of securing a tribunal where a more liberal rule of damages obtains than in the New York courts. This contention cannot be sustained for the reason, already pointed out, that the land was purchased by the defendant-in-error before the condemnation proceedings were begun in the State Court.

We cannot indulge in conjecture or guesswork. 1559 For aught that appears in the record the sale to William Sage, Jr., was a perfectly fair, honest and legitimate one.

The second, and principal question is, was the court justified in awarding an additional sum of \$4,324.45 because of the availability and adaptability of the land for reservoir purposes? The answer to this question depends largely upon whether we are to be controlled by the rule of the State or the United States courts.

The McGovern case throws very little, if any, light upon the present controversy. Although the same question was involved, it was decided adversely 1560 to the contention of the land owner by the Commissioners, by the Supreme Court and the Court of Appeals of New York, which courts sustained the ruling of the Commissioners, refusing to admit testimony as to the exceptional value of the land for a reservoir site. The claimant thereupon sued out a writ of error, insisting that the refusal to hear the testimony was in effect depriving him of his property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States. The Supreme Court decided that

the record did not show that the plaintiff-in-error had been deprived of his property without due process of law, even if it be assumed that it was error to exclude the proffered evidence. 1561

Although there are expressions in the opinion which, perhaps, indicate that the Court regarded the ruling of the State Court correct, the question now in issue was not decided. The opinion concludes as follows:

"We are satisfied on all the authorities that whether we should have agreed or disagreed with the Commissioners, if we had been valuing the land, there was no such disregard of plain rights by the Courts of New York as to warrant our treating their decision, made without prejudice, in due form and after full hearing, as a denial by the State of due process of law." 1562

The question here is not whether the property of the defendant-in-error has been taken without due process of law, but whether the Commissioners and the Circuit Court erred in allowing the defendant-in-error damages based upon the availability of his land for reservoir purposes. The award was made by Commissioners appointed by the State Court prior to the removal, and, had the amount of \$11,948.90 been awarded for the value of the land, buildings and quarry, it would not, in view of the testimony, have been exorbitant. However, the separate award of \$4,324.45 for reservoir availability and adaptability makes it necessary for us to consider the question as stated above. 1563

That the Ashokan site is peculiarly suitable for reservoir purposes cannot be disputed. Indeed, it may almost be said that it is the only available location for a reservoir from which the great City of

- 1564 New York can be supplied with an abundance of pure water. Located, as the city is, on a narrow peninsula, between two tidal rivers, it is evident that the choice of sites which the State can control is an exceedingly limited one. A glance at the map seems to demonstrate the proposition that the supply of water for such an immense number of people must come from a reservoir located west of the Hudson and above the New Jersey line. The Ashokan site could not escape the attention of a competent engineer employed to make the selection. The process of exclusion would inevitably bring him to the Esopus watershed. Its availability for furnishing New York with pure water was appreciated
- 1565 fourteen years ago, when the Ramapo Company was organized for the purpose of selling the water in question, not only to the City of New York, but to other cities of the State located on both banks of the Hudson. The availability of the Ashokan site induced the City of Kingston to make a careful examination of its capacity for furnishing a supply of water to that city. In short, without entering further into details, it can hardly be disputed that the Ashokan site was the natural place for the reservoir which is to supply the fast increasing multitude of people who dwell on both sides of the Hudson and that this availability has been proved
- 1566 and was publicly known long before the City of New York instituted these proceedings. It must have been evident to all intelligent land owners that their property would, in the near future, inevitably be acquired as part of an immense water system. That this demand increased the value of these lands follows as a necessary conclusion. To value them only according to the tons of hay or the bushels of potatoes they produce, ignores the other elements of value, namely, that their possession

was necessary in order that water might be furnished to the increasing millions along the banks of the Hudson. We are not at all convinced that, with the question presented upon the testimony in this record, the State Courts would have decided as they did in the cases reported in 130 App. Div. 350, 356, *aff'd* 195 N. Y. 573.

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Thus, in the opinion confirming the award of the Commissioners relating to Parcel 271-A, the Court says:

"It is true that he (the owner) is not limited in compensation to the use which he makes of his property, but is entitled to a fair market value, for any use to which it is adapted by virtue of its location and for which it is available . . . The value of property is not limited by the present use or the use for which it is sought, as either may be more or less than its market value. For example, land may be valuable, abstractly considered, for reservoir purposes, but its market value would depend upon a demand for such a purpose. If no one desired the property for a reservoir, its value might be much less than for any other purpose. . . . No evidence was given in the present case tending to show that before the land was taken by the City it was regarded as more valuable because of its advantage of location and adaptability for use as a reservoir."

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Again, on the appeal from the order of confirmation as to Section 6, the Appellate Division said:

"The appellant did not prove or attempt to prove that the value of the property in question or any of the property included in the reservoir site, had been increased by its adaptability or availability for reservoir purposes be-

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fore the commencement of this proceeding. There is no shadow of evidence of any prior demand for the property as a reservoir site or of any customer who would give more for it for that purpose, or of any circumstance by which the value of the parcel in question as a part of a natural reservoir site could be estimated or determined."

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Such evidence has, we think, been given in the case at bar—evidence from which the presumption follows, almost as a conclusion, that with the increase of population in the valley of the Hudson, the Ashokan site would inevitably be appropriated, if not by New York, then by some other city or group of cities.

1572

There is in the present case evidence that the Ashokan site had long been known and its availability as a great reservoir recognized by experts and business men and efforts to acquire it had from time to time been made. If the State Courts had passed upon the identical question presented by the evidence in the case at bar, we might feel constrained, in the absence of a controlling authority of the Supreme Court, to follow their decision, but, for the reasons just stated, we cannot find that they have passed upon the precise question involved in the cases relied on by the plaintiff-in-error. In these circumstances we deem it our duty to follow the case of *Boom Company vs. Patterson*, 98 U. S. 403, which holds in substance that the value of the land in question is increased because of its availability as a reservoir site. Patterson owned some islands in the Mississippi River about an eighth of a mile from its western bank, when connected with the mainland a boom of immense capacity for holding logs was formed which was of great value to the company. The islands were worth about \$300,

but their availability for forming, in connection with the mainland, a receptacle in which millions of logs could be stored added to their value about \$5,000 and a judgment for \$5,500 was affirmed. The Supreme Court held that the adaptability of the islands for boom purposes added greatly to their value and was properly considered in estimating the value of the land. See also *Great Falls Co. vs. U. S.*, 16 U. S. Ct. Claims, 160, affirmed 112 U. S. 645.

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Matter of Gilroy, 85 Hun, 424;

In re Gough, L. R., 1 K. B., 417.

We have examined the other assignments of error and are of the opinion that none of them requires a reversal of the orders.

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The orders are affirmed.

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At a Stated Term of the United States
Circuit Court of Appeals, in and
for the Second Circuit, held at
the Court Rooms in the Post
Office Building in the City of
New York, on the 25th day of
July, one thousand nine hundred
and thirteen.

Present—Hon. ALFRED C. COXE,
Hon. HENRY G. WARD,
Circuit Judges, and
Hon. GEORGE C. HOLT, District Judge.

1577

In the Matter

of

The Petition of JOHN A. BENSEL,
et al., Constituting the Board
of Water Supply of The City
of New York.

THE CITY OF NEW YORK,
Plaintiff-in-Error,

1578

against

WILLIAM SAGE, JR.,
Defendant-in-Error.

**Error to the Circuit Court of the
United States for the Southern
District of New York.**

This cause came on to be heard on the transcript
of record from the Circuit Court of the United

States, for the Southern District of New York, and 1579
was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the orders of said Circuit Court be and they hereby are affirmed with costs.

A. C. C.

It is further ordered that a mandate issue to the District Court in accordance with this decree.

Endorsed: United States Circuit Court of Appeals, Second Circuit. *In re* John A. Bense, *et al.* Order for Mandate. United States Circuit, Court of Appeals, Second Circuit. Filed, Jul. 1913. Wm. 1580
Parkin, Clerk.

1582 UNITED STATES CIRCUIT COURT OF
APPEALS,

FOR THE SECOND DISTRICT.

In the Matter

of

The Application and Petition of JOHN A. BENSEL, CHARLES N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York, under Chapter 724 of the Laws of 1905 and the Acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

1583

THE CITY OF NEW YORK,
Plaintiff-in-Error
(Petitioner),

against

1584

WILLIAM SAGE, JR.,
Defendant-in-Error,
(Claimant below).

Petition for Rehearing.

To the Honorable the Judges of the United States
Circuit Court of Appeals for the Second Cir-
cuit:

Having carefully examined the opinion of the
Honorable Court, we think that with propriety,

we may ask the Court to consider whether this case be not one in which it will be proper to grant a re-hearing to the Plaintiff-in-Error, the City of New York, on the grounds hereinafter set forth. 1585

This application for a re-hearing is not made with the intent of asking the Court for another opportunity to argue the questions of law discussed by the Court in the Court's opinion, but respectfully to call the attention of the Court to the facts, especially to the variances in facts between the Court's opinion and the record and maps.

1. The Sage farm was not part of the Ramapo site or the City of Kingston site. There was no demand for the Sage farm for reservoir purposes except by the City of New York, and the value to the City of New York, the condemning party, should be excluded under the opinion of the United States Supreme Court in the McGovern case. 1586

There is submitted herewith a map of the Ashokan reservoir showing the location of the Ramapo and the Kingston proposed reservoirs in red, the location of the two McGovern parcels reported in 130 App. Div. , affirmed in 195 N. Y. and affirmed in the United States Supreme Court, in 229 U. S. and the location of the Sage parcel. This is the map submitted to this Court on argument, with the McGovern parcels added. 1587

In this Court's opinion in the Sage case (fols. 16 and 17), the Court writes:

"Its availability for furnishing New York with pure water was appreciated fourteen years ago, when the Ramapo Company was organized for the purpose of selling the *water in question*, not only to the City of New York, but to other cities of the State located on both banks of the Hudson. The availability of the Ashokan site induced the City of

1588

Kingston to make a careful examination of its capacity for furnishing a supply of water to that city."

It is evident from this statement in the Court's opinion that the Court was of the impression that the Kingston and Ramapo sites included the McGovern parcel and the Sage farm.

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The location of the Kingston site was at Bishop's Falls (fol. 1273), further up stream than the Ashokan dam built by the City of New York; similar was the location of the Ramapo site. Both the Ramapo and the Kingston proposed reservoirs were located on the Esopus creek. Both the McGovern parcels and the Sage parcel were located on the Beaverkill, another creek which joins the Esopus some two miles down stream from the Ramapo and the Kingston sites. The City of New York, as appears from the testimony and the map, has in fact constructed two distinct reservoirs, arranged so that either can supply the aqueduct. One reservoir includes the Ramapo and Kingston sites and the other reservoir includes the McGovern and Sage farms. There is one dam enclosing the Esopus creek and a dike enclosing the Beaverkill. Separate pipes connect these two reservoirs with the aqueduct.

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The Sage farm is five miles away from the proposed Ramapo and Kingston sites. It is a different watershed. No rain falling on the Sage farm would have flowed into the Ramapo and Kingston proposed reservoirs, and merely to impound the water of the Esopus creek would not have required a reservoir larger than the City of New York constructed on that site, and would have excluded both the McGovern parcels and the Sage parcel.

The facts are the same as to the McGovern and Sage parcels, except that the Sage parcel was sev-

eral miles more distant from the Ramapo and Kingston sites. Also, the Ramapo and Kingston sites had an elevation of only 500 feet and the elevation of the Sage farm is 587 feet. Besides being more than five miles away, it is at a higher elevation and would have no value for reservoir purposes either to the Ramapo Company or the City of Kingston. The testimony in folios 203 to 215 is conclusive that the eastern reservoir was not required and was not built for the purpose of impounding the water of the Esopus creek, which was the Ramapo "water in question." 1591

The western reservoir was for that purpose. The eastern reservoir is where the McGovern and Sage parcels are located. These parcels are not required for the storage of the water from the Esopus. (Claimant's witness Vermeule, fol. 609.) 1592

"Q. Isn't the other portion of the reservoir sufficient to store the water from the Esopus?

A. It is sufficient, but you are asking me if it can be so used.

Q. No, I am asking you if it is necessary, in order to store water from the Esopus? A. No, the part of the reservoir running from the cross embankment would be sufficient for the Esopus alone.

Q. And this particular parcel is without that area? A. Yes." 1593

We would respectfully refer to another misapprehension of facts in the Court's opinion (fol. 19):

"We are not at all convinced that with the question presented upon the testimony in this record the State Courts would have decided as they did cases reported in 130 A. D. 350, 356, affirmed 195 N. Y. 273."

- 1594 These decisions of the State Courts apply to the McGovern parcels, 271-A and 246, as to which the Courts wrote:

"No evidence was given in the present case tending to show that before the land was taken by the City it was regarded as more valuable because of its advantage of location and adaptability for use as a reservoir."

"There is no shadow of evidence of any prior demand for the property as a reservoir site or of any customer who would give more for it for that purpose."

- 1595 We would respectfully insist that there is not a line or shred or inference in the Sage record, "no shadow of evidence of any prior demand" for the Sage farm "as a reservoir site or of any customer who would give more for it for that purpose." All the evidence in the record as to a prior demand was as to the Ramapo and Kingston sites which are shown on the map.

This Court did not have before it the record of the trial of the McGovern parcel, 271-A, or it would not have assumed that this testimony in the Sage case had not been presented to the State Courts.

- 1596 Cornelius E. Vermeule, who was the leading expert and engineer for the claimant in the Sage case, whose testimony is found on pages 181 to 225 of the Sage record, was the leading expert and engineer for the claimant in the McGovern case Parcel 271-A, and his testimony as it appears in the printed record of the McGovern testimony, Parcel 271-A in the State Courts, being Volume 1 of Ashokan Reservoir, Section 7, pages 957 to 1002, is practically the same as in the Sage case. His method of computation is the same and his testimony is more voluminous. The Commission held, and every Court in New York sustained its decision that there was no

evidence of any prior demand for Parcel 271-A, or any other parcel in the eastern or Beaverkill reservoir. 1597

"No evidence was given in the present case" any more than in the McGovern case "tending to show that before the land was taken by the City it was regarded as more valuable because of its advantage of location and adaptability for use as a reservoir."

Also, the City of Kingston rejected the Bishop's Falls site (fol. 1273). The Ramapo project had been abandoned many years and the market value of the Sage farm was fairly reflected in the price of \$4,500 for which it sold in the open market (fol. 1031) two days before the Commissioners of Appraisal in this proceeding were appointed, and long after it was known that the City of New York would take this property. 1598

The only evidence in the Sage case of any demand for property for reservoir purposes is the demand in the Esopus water basin five miles away. The testimony of claimant's witnesses, Vermeule, Horton and Nostrand, in this Sage case was as to the value of this parcel to the City of New York for reservoir purposes, based on the cost of construction, the City water rates, the softness of this water and the necessities of the City of New York for taking it (fols. 563-581). 1599

"Question: Those figures are the savings to the City of New York? Answer: Yes" (fol. 581).

It is respectfully submitted that this is contrary to the opinion of the Supreme Court of the United States in the McGovern case:

"It is conceded 'that the owner is not permitted to take advantage of the necessities of the condemning party,' and it would seem that it well might be that the Commissioners re-

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garded it as too plain to be shaken by evidence, on the public facts, that the value of the land for a reservoir site could not come into consideration except upon the hypothesis that the City of New York could not get along without it and that its only means of acquisition was voluntary sale by owners aware of the necessity and intending to make from it the most they could. It is just this advantage that a taking by eminent domain excludes."

1601

The Esopus creek is 50 or 60 miles long. There are a number of possible reservoir sites at different points along the creek. The mistake in this Court's opinion on the Sage case, we would respectfully urge, is in confusing the Ramapo and Kingston sites with the site which takes in the McGovern parcels and the Sage farm. The Sage farm site had never been considered until New York City, in providing for the future possibilities of impounding Schoharie and Rondout creeks, concluded to build a double reservoir instead of a single reservoir which included the Ramapo and Kingston sites.

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The claimant's evidence as to reservoir availability value was not based on any prior demand or any other demand than by the City of New York, as the record shows. Here the claimant called four engineers, J. Waldo Smith, Peter E. Nostrand, C. E. Vermeule and Robert E. Horton, who gave 100 pages of testimony as to the value of the whole Ashokan reservoir site to the City of New York and the proportionate part of that value which parcel 733 would carry.

It is respectfully submitted that this value is the very value to which the United States Supreme Court in the McGovern case said that the claimant was not entitled.

Similar is the recent opinion of the United States Supreme Court in the case of United States

vs. Chandler-Dunbar Company, 229 U. S. 53, where in disallowing an award for strategic value, the Court said:

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"This allowance has no solid basis upon which it may stand. That the property may have to the public a greater value than its fair market value affords no just criterion for estimating what the owner should receive. It is not proper to attribute to it any part of the value, which might result from a consideration of its value as a necessary part of a comprehensive system of river improvement which should include the river and the upland upon the shore adjacent. The ownership is not the same. The principle applied *Boston Chamber of Commerce vs. Boston*, 217 U. S. 189 is applicable."

1604

The opinion of the Court in this case in effect nullifies the decision of the Supreme Court of the United States in the McGovern case. There is no evidence in this case to show that parcel No. 733 was regarded as more valuable because of its adaptability for use as part of a reservoir, or that there was any prior demand for it as part of a reservoir or that any customer would give more for it for that purpose. The testimony as to the Ramapo Company or as to the consideration of the Esopus by the City of Kingston as a water supply does not furnish such proof.

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The evidence by claimant here was as to another site five miles distant from parcel 733. This other site was considered by the City of Kingston and rejected (fols. 1262-1275). The estimated cost to the City of Kingston would be \$550,000 (fol. 1275). This site, as the annexed map shows, was only a fraction of the site chosen by the City of New York, and parcel 733 was nowhere near the City of Kingston site nor the Ramapo site. The

1606 prior demand, if any, had been for another site than parcel 733. The Ramapo plans included a series of smaller reservoirs which would have left parcel 733 some miles distant. The City of Kingston rejected this site and the Ramapo Company had no right of condemnation. As further stated above, only a fraction of parcel 733 is to be used for a reservoir.

If by merely shifting the title of other parcels to be acquired to a citizen of the State of New Jersey or some other State, and transferring the cases to the Federal Court a different rule of damages will be applied, by which increased awards can be obtained for property taken in connection with the Ashokan reservoir, the decision of the Supreme Court of the United States in the McGovern case will be without effect, as all parcels on the water shed will be transferred to citizens of other States before the filing of the petition which this Court holds is the beginning of this proceeding.

2. Assuming that the reservoir availability value of the Sage farm, Parcel 733, Section 15, Ashokan Reservoir, was as found by the Commission, the claimant was entitled to that value as an addition to the value of the land only, and not as an addition to the value of the house, barn and quarry also.

1608 From the claimant's testimony it appears that the buildings were worth \$5,225 (fol. 296), while the Commissioners found a reservoir availability value of only \$4 324, or almost a thousand dollars less than the value of the buildings.

It is as to these facts that this Sage award differs from the award in *Boom Co. vs. Patterson*, 98 U. S., 403. As the Court in its opinion by COXE, J., states

"In these circumstances we deem it our duty to follow the case of *Boom Company vs. Pat-*

terson, 98 U. S., 403, which holds in substance that the value of the land in question is increased because of its availability as a reservoir site. Patterson owned some islands in the Mississippi River about an eighth of a mile from its western bank, when connected with the mainland a boom of immense capacity for holding logs was formed which was of great value to the company. The islands were worth about \$300, but their availability for forming, in connection with the mainland, a receptacle in which millions of logs could be stored added to their value about \$5,000 and a judgment for \$5,500 was affirmed. The Supreme Court held that the *adaptability* of the islands for boom purposes added greatly to their value and *was properly considered in estimating the value of the land.*"

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In this proceeding the property condemned was a farm described on pages 96-7-8-9 by claimant's witnesses. In addition to the land it had (fol. 287) a house, hennery, barn, wagon house, granary and pig pen; also some timber (fol. 291), an orchard (fol. 302) and a quarry (pp. 116, 131). Claimant's witness Sacks valued the buildings at \$5,225 (fol. 296). Claimant's witness valued the quarry at \$1,440 (fol. 350). Claimant's witnesses also valued the lumber and orchard in connection with the land.

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It is a self evident proposition that the value of the land for a reservoir would have been no less without any buildings, lumber and orchard. Indeed, its value would have been slightly greater for reservoir purposes if it were cleared, because any one using it for a reservoir would be put to the expense of cutting down the trees and removing the buildings. The presence of a quarry did not affect its reservoir availability value at

1612 all. To use this land for a reservoir the buildings, trees and quarry would be removed or destroyed.

The Commission undoubtedly took into consideration that in determining the reservoir availability value only part of Parcel 733 would be flooded with water and that the remainder was taken for the purpose of changing the highway and railroad and having a protective strip. Only part of Parcel 733 had any reservoir value. The Commission evidently did not take the figures of claimant's witnesses as to reservoir availability or they would have given a much higher award.

1613 What the Commission did do was to find separately the value of the land and buildings (see their report, p. 471) and fix the value of the land and buildings to be \$7,624.45 and then add the sum of \$4,324.45 for reservoir availability and adaptability. If the Commission had added the reservoir availability value to the land value as was done in the Boom case, they would have followed this Court's construction of the Boom case. As the Court says in its opinion herein that the adaptability of the islands for boom purposes "was properly considered in estimating the value of the land," the City of New York respectfully submits that it was error to add this availability value

1614 to the value of the house, barn and quarry also, and that under the opinion of this Court the claimant was entitled either to the value of his land, house, barn and quarry, or to the value of his land only and the reservoir availability value of that land.

Suppose that this land had on it a country store building and was only 5 acres instead of 85. The value for reservoir purposes depends on the acreage and storage capacity of the land, not on the building on it. The 85-acre farm would have 17 times the reservoir availability value of the 5

acre country store plot. The store buildings might be worth \$10,000. The farm buildings might be worth, as testified to here, \$5,225. Surely the country store-keeper would not be entitled to the value of his lot as a country store site, plus the value of the country store buildings on it, plus the reservoir availability value. Neither is Mr. Sage entitled to the value of his land plus the value of the house, the barn and other farm buildings, also plus the reservoir availability value which is based on his acreage. 1615

It is respectfully submitted that under the opinion of the Court herein, the reservoir availability value being less than the building value, the City's motion to give the claimant the larger valuation (pages 480-1) should have been granted, and the claimant should not have received the total of two contradictory values. This question was raised in the third assignment of errors (fols. 1503-1511). The Court's construction of the Boom Co. opinion is in accordance with the City of New York's contention here, that to add reservoir availability value to the land would necessarily exclude the value of the buildings and quarry. 1616

A rehearing is respectfully asked because of the great importance of this matter to the City of New York. The Court holds in its opinion that after the maps had been filed and publication made, a citizen of New Jersey can acquire title and come within the benefits of a more liberal rule of the United States Courts. The City of New York is now beginning further proceedings for taking additional land. Before the petition can be heard by the Court public notice must be given of the lands to be taken, as was done with Parcel No. 733. The land will have a reservoir availability to a resident of New Jersey which it would not 1617

1618 have to a resident of New York. If in addition thereto, a resident of New Jersey besides being paid for his land and for the reservoir availability value can also collect for the houses, barns, other structures and quarries on that land, the cost to the City of New York will be greatly increased, and speculating in these lands will be greatly encouraged. Here it appears that Mr. Sage bought this farm land, buildings, quarry and all for \$4,500 (fol. 1031). He took title on May 17th, 1909. On May 27th, 1909, ten days later, the City of New York became vested with the title through condemnation proceedings. He now receives an award of \$11,948.90 or a profit of 150 per cent. in ten days, with interest from May 27, 1909, \$1,372 expenses for witnesses and \$597 for counsel, besides which the City of New York must pay the Commissioners' fees, stenographers and other expenses. If the City of New York is to be subject to such claims, profits, expenses and fees, the future development of its water supply will be greatly hampered.

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Upon the foregoing grounds the plaintiff-in-error and your petitioner respectfully prays that this Honorable Court grant to it a rehearing of said cause.

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ARCHIBALD R. WATSON,
Corporation Counsel.

WM. MCM. SPEER,
LOUIS C. WHITE,
Counsel for Petitioner.

I, Louis C. White, of counsel for the petitioner herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded and that the same is not interposed for delay.

LOUIS C. WHITE.

At a Stated Term of the United States 1621
 Circuit Court of Appeals for the
 Second Circuit, held at the Post
 Office Building, City of New
 York, on the 29th day of September,
 1913.

Hon. ALFRED C. COXE,
 Hon. HENRY G. WARD,
 Circuit Judges, and
 Hon. GEORGE C. HOLT,
 District Judge.

In the Matter 1622

of

The Petition of JOHN A. BENSEL
et al., constituting the Board of
 Water Supply of the City of
 New York,

THE CITY OF NEW YORK,
 Plaintiff-in-Error,

vs.

WILLIAM SAGE, JR.,
 Defendant-in-Error.

1623

A petition for a rehearing having been filed herein, on behalf of the plaintiff-in-error,

After due consideration thereof, it is

Ordered that said petition be and hereby is denied:

A. C. C.
 H. G. W.

1624 Endorsed: United States Circuit Court of Appeals, Second Circuit. *In re John A. Bensei et al.* Order. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 3, 1913. William Parkin, Clerk.

United States of America, }
Southern District of New York, } ss.:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 541 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of:

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CITY OF NEW YORK,
Plaintiff-in-Error,

vs.

WILLIAM SAGE, JR.,
Defendant-in-Error,

as the same remain of record and on file in my office.

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In Testimony Whereof I have caused the seal of the said Court to be hereunto affixed, at The City of New York, in the Southern District of New York, in the Second Circuit, this 29th day of October. in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the said United States the one hundred and thirty-eighth.

(Seal United States Circuit Court of Appeals,
Second Circuit.)

WM. PARKIN.
Clerk.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which The City of New York is plaintiff in error and William Sage, Jr., is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the ninth day of January, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 23,958. Supreme Court of the United States, No. 807, October Term, 1913. The City of New York vs. William Sage, Jr. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 22, 1914. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

THE CITY OF NEW YORK, Plaintiff-in-error,
against

WILLIAM SAGE, JR., Defendant-in-error.

It is hereby stipulated between the plaintiff-in-error, by its attorney, and the defendant-in-error, by his attorney, that the certified transcript of the record and proceedings had in the United States Circuit Court of Appeals, Second Circuit, in the case of the City of New York, plaintiff-in-error vs. William Sage, Jr., defendant-in-error, filed in the Supreme Court of the United States on or about December 6, 1913 in connection with the application for a writ of certiorari, as provided by section 3 of Rule 37 of that Court, shall be taken and considered by the Supreme Court of the United States as the return by the United States Circuit Court of Appeals to the writ of certiorari allowed by the said Supreme Court of the United States on the 9th day of January, 1914, without the defendant-in-error waiving the right to submit to the United States Supreme Court

a written stipulation heretofore made between the plaintiff-in-error and the defendant-in-error in regard to the award.

Dated, January 22, 1914.

EDWARD A. ALEXANDER,
Attorney for Defendant-in-error.
LOUIS C. WHITE,
Attorney for Plaintiff-in-error.

(Endorsed:) United States Circuit Court of Appeals for the Southern Circuit. The City of New York, Plaintiff-in-error, against William Sage, Jr., Defendant-in-error. Stipulation. Archibald R. Watson, Corporation Counsel, Hall of Records, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 22, 1914. William Parkin, Clerk.

To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, January 22, 1914.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
*Clerk of the United States Circuit Court of
Appeals for the Second Circuit.*

[Endorsed:] 807/23958. United States Circuit Court of Appeals, Second Circuit. City of New York, Pl'ff in Error, v. Wm. Sage, Jr., Def't in Error. Return to Certiorari. 1.90.

[Endorsed:] File No. 23,958. Supreme Court U. S. October term, 1913. Term No. 807. The City of New York, petitioner, vs William Sage, Jr. Writ of certiorari and return. Filed January 27, 1914.

Supreme Court of the United States.

In the Matter
of

The Petition of The City of
New York for a writ of
certiorari to the United
States Circuit Court of Ap-
peals for the Second Circuit
in the case therein entitled:

In the Matter
of

The Application and Petition
of John A. BenseL, Charles
N. Chadwick and Charles
A. Shaw, constituting the
Board of Water Supply of
The City of New York, to ac-
quire real estate for and on
behalf of The City of New
York, under chapter 724 of
the Laws of 1905, and the
acts amendatory thereof, in
the Town of Hurley, Ulster
County, New York, for the
purpose of providing an ad-
ditional supply of pure and
wholesome water for the use
of The City of New York.

The City of New York,
Plaintiff in Error,
against

William Sage, Jr.,
Defendant in Error.

Please take notice that upon the annexed peti-
tion, an application will be made to the Supreme

Court of the United States, at the opening of the Court on Monday, December 22, 1913, or as soon thereafter as counsel can be heard, for a writ of certiorari herein.

ARCHIBALD R. WATSON,
Corporation Counsel,
Attorney for Petitioner.

TO EDWARD A. ALEXANDER,
Attorney for Defendant in Error.

Dated December 4, 1913.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of The City of New York for writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit respectfully shows to this honorable Court:

First—Your petitioner is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

Second—Your petitioner, under the provisions of chapter 724 of the Laws of 1905 of the State of New York and the acts amendatory thereof, acquired by eminent domain lands in the County of Ulster, State of New York, to be used for a reservoir to secure an additional supply of pure water.

Third—Your petitioner, under the provisions of the statute, is required to make and file maps upon which shall be laid out and numbered the various parcels of real estate to be taken, and after such filing to make application to the Supreme Court of the State by petition, upon six weeks' notice by

posting and by publication in newspapers, for the appointment of Commissioners of Appraisal.

Fourth—Owing to the great area to be taken for the reservoir, over 15,000 acres, and the great number of separate and distinct parcels comprising the same, over 1,140, it was divided, as permitted by the statute, into sections and application was made to the Supreme Court from time to time for the appointment of Commissioners of Appraisal for the different sections. The map of the first section was filed in Ulster County on January 3, 1907, and those of sections 2 to 14 inclusive between that time and March 4, 1909, when the map of section 15, which embraced among other parcels Parcel 733, was filed. At that time the record owner of Parcel 733 was Solomon T. De Lee, a citizen of the State of New York. After the map was filed statutory notice was given that on May 22, 1909, a petition for the appointment of Commissioners of Appraisal for section 15 would be presented to the Supreme Court. At the time and place mentioned in said notice and upon the presentation of said petition the court appointed three Commissioners of Appraisal who took, subscribed and filed their oaths of office in Ulster County, New York, on the 27th day of May, 1909, and certified copies in the office of the Clerk of the County of New York on May 28, 1909, at which time The City of New York, as provided in the statute, became seized in fee of the parcels in said section 15.

Fifth—On the 29th day of April, 1910 (Rec., fol. 25), upon the petition of William Sage, Jr., that he was a citizen of the State of New Jersey and the owner in fee of parcel No. 733, an order was issued by the Supreme Court of the State of New York removing the proceeding as to that parcel to the United States Circuit Court for the Southern District of New York (Rec., fol. 43).

Sixth—On the 31st day of October, 1910, Mr. Sage made a motion in the United States Circuit Court for an order appointing Commissioners of Appraisal (Rec., fol. 49), and on November 4, 1910, The City of New York made a motion for an order remanding the proceeding back to the Supreme Court of the State of New York (Rec., fol. 73). Circuit Court Judge Noyes denied the motion to remand (Rec., fol. 98) and held that the removal of the proceeding from the State Court included the order appointing Commissioners of Appraisal and denied the motion for the appointment of new Commissioners (Rec., fol. 98).

Seventh—The case came on for trial before the Commissioners and there was offered in evidence a deed dated May 17, 1909, nearly six weeks subsequent to the posting of the notice of the application to be made to the Court for the appointment of Commissioners of Appraisal and to the commencement of the newspaper publication of said notice, five days' prior to the hearing in Court on the petition and only eleven days' prior to the date when title vested in The City of New York, transferring Parcel 733 to William Sage, Jr. (Rec., fol. 105), the purchase price being as stipulated by the claimant, \$4,500 (Rec., fol. 1031).

Eighth—The Commissioners of Appraisal in their report made an award of \$7,624.45 for land and buildings and the further sum of \$4,324.45 for reservoir availability and adaptability being a grand total of \$11,948.90 (Rec., fol. 1424). The City moved to confirm the report as to the \$7,624.45 only, contending that there should be no further sum awarded for reservoir availability, and the claimant moved to send the report back on the ground that the amount awarded for reservoir availability was inadequate. Circuit Court Judge Lacombe confirmed the report as made by the Commissioners (Rec., fol. 1449).

Ninth—The City of New York sued out a writ of error in the Circuit Court of Appeals for the Second Circuit, claiming that the Circuit Court for the Southern District of New York erred in the following respects:

I.—That the Court erred in removing this proceeding from the State Court to the United States Court.

II.—That the Court erred in holding that there was evidence before the Commissioners of Appraisal of any value for reservoir availability and adaptability except to the condemning party, The City of New York.

III.—That the Court and the Commission erred in holding that the claimant is entitled to compensation, both for reservoir availability and adaptability, and for the value of the farm buildings and quarry; and that these two values are contradictory and that the claimant is not entitled to the sum of contradictory values.

IV.—That the award is grossly excessive.

V.—That in arriving at their award the Commissioners of Appraisal proceeded on an erroneous theory.

VI.—That the award of the Commissioners of Appraisal in the Catskill Water Supply proceedings cannot be confirmed until a motion for confirmation is duly made, and that no motion for the confirmation of that part of the award as to reservoir availability and adaptability was made by either party.

VII.—That the claimant in this proceeding took the property subject to the rule as laid down by the highest court of the State of New York, and

that it was error to make an award in disregard of that rule.

VIII.—That the only question before the Court was whether the report should be rejected *in toto* or the land and building value confirmed and the rest of the report rejected and that the Court erred in confirming the whole report.

IX.—That the Court erred in holding that the rule laid down in *Boom Co. vs. Patterson*, 98 U. S., 403, applied to this parcel in this proceeding, and was the proper method of determining value, and that if said rule did apply, the Commissioners of Appraisal herein erred in that they did not follow it.

Tenth—The case came on to be heard before Coxe and Ward, Circuit Judges, and Holt, District Judge, and the opinion of the Court was delivered on the 15th day of July, 1913, by Coxe, affirming the judgment of the Lower Court (Rec., page 517). A petition for re-hearing was presented (Rec., page 528) and denied, without opinion (Rec., page 541).

Eleventh—Your petitioner is advised and believes that said judgment of the Circuit Court of Appeals is erroneous, and that this Court should require the said case to be certified to it for its review and determination for the following reasons:

(1) The Circuit Court of Appeals erred in refusing to remand this case back to the Supreme Court of the State of New York.

(2) Both the Circuit Court of Appeals and the Circuit Court for the Southern District of New York upheld the additional award for reservoir availability and adaptability on the authority of *Boom Co. vs. Patterson*, 98 U. S., 403. That case is not applicable to the one at bar,

(a) because the property of 86 acres here involved had no adaptability of itself for reservoir purposes, and was only made adaptable by The City of New York by combining it with thousands of other acres, and at an expense of \$18,000,000 for dams and dikes,

(b) because its so-called reservoir value is simply its proportionate share of an estimate of the value of the entire reservoir site, comprising thousands of parcels with different titles, as a whole contrary to the principle laid down by this Court in *Boston Chamber of Commerce vs. the City of Boston*, 217 U. S., 189.

(c) The Circuit Court of Appeals has assumed that because years ago sites on the Esopus River had been considered by the City of Kingston and the Ramapo Water Company for the location of reservoirs that those sites were the site selected by The City of New York for the Ashokan Reservoir, which is not the fact.

(d) The Testimony shows that only about half of the Ashokan Reservoir would be needed to store all the water that can be obtained from the Esopus River and that parcel 733 here under consideration was not needed for such purpose.

(e) That in the Boom Company case the value for availability and adaptability was added to the land value, while in this case the reservoir and availability value was added to the value of the land plus the value of the farm house, barn and other buildings on the land, the value of the land and buildings as found by the Commission exceeding the reservoir availability value. In this manner the claimant received the sum total of two contradictory values, "the farm house and buildings obviously adding nothing to the reservoir value, but being a detriment.

(3) The decision of the Circuit Court of Appeals conflicts with the decision of the courts of the State of New York, 130 App. Div., 350, 356; affirmed 195 N. Y., 573, holding that it is only when availability and adaptability for reservoir purposes has actually influenced the price for which property could be sold in the market, that its use for that purpose can be taken into consideration by Commissioners of Appraisal in fixing its market value, which decision was affirmed by this Court in the McGovern case, 229 U. S., 67.

(4) If the decision of the Circuit Court of Appeals is permitted to be final under which increased awards can be obtained in the Federal Courts, the decision of this Court in the McGovern case, 229 U. S., will in effect be nullified, for the reason that the title to all parcels to be taken in the future by The City of New York for reservoir purposes will be transferred to citizens of other States after the filing of the maps and public notice, the return of the petition is as the Circuit Court of Appeals holds the beginning of the proceeding, and the cases will be removed from the State to the Federal Court.

(5) The plans of The City of New York for its water supply take in four water sheds, the Esopus River and its tributaries, the Rondout River and its tributaries, the Catskill Creek and its tributaries and the Schoharie Creek and its tributaries, with reservoirs located in each (Rec., fols. 1197, 1198). The land thus far taken has been for the reservoir on the Esopus Water Shed only, although part of the water to be stored in that reservoir is to be brought from the Schoharie Water Shed by a tunnel through the mountain and stored and delivered through the Ashokan Reservoir. In carrying out its plans it will be necessary for The City of New York to take

thousands of other parcels for the construction of the "two reservoirs on the main Rondout Creek, Lackawack and Napanoch, four small reservoirs on the Rondout below the Napanoch" (Rec., fol. 199) and also for the Prattsville Reservoir on the Schoharie, and it is of the utmost importance that the question here involved should be passed upon by this Court.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record of all proceedings of said Circuit Court of Appeals herein to the end that the said cause may be reviewed and determined by this Court, or that your petitioner may have such other or further relief in the premises as to this Court may seem appropriate, and that the said judgment of the said Circuit Court of Appeals in this case may be reversed by this honorable Court.

THE CITY OF NEW YORK,
Petitioner.

By ARCHIBALD R. WATSON,
Corporation Counsel,
Attorney for Petitioner.

WM. McM. SPEER,
LOUIS C. WHITE,
of Counsel.

State of New York, }
 County of New York, } ss.:

Louis H. Hahlo, being duly sworn, says that he has been duly designated as Acting Corporation Counsel of The City of New York, and as such that he is an officer of the petitioner herein: That the foregoing petition is true to his knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the defendant is that it is a corporation; that the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: Information obtained from the books and records of the Law Department and other departments of the city government, and from statements made to him by certain officers or agents of the petitioner and from the proceedings and in the record of the cause in the Circuit Court and in the United States Circuit Court of Appeals, Second Circuit.

Sworn to before me, this 3d
 day of December, 1913.

LOUIS H. HAHLO.

DAVID F. DENNEHY,
 Notary Public,
 Kings County.

Certificate filed in New York County.

I hereby certify that the foregoing petition is presented in good faith, and not for the purpose of delay, and that in my opinion the case is a proper one for granting the relief prayed for herein.

LOUIS C. WHITE,
 Counsel for Petitioner.

Supreme Court of the United States.

In the Matter

of

The Petition of The City of New York for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in the case therein entitled:

In the Matter

of

The Application and Petition of John A. BenseL, Charles N. Chadwick and Charles A. Shaw, constituting the Board of Water Supply of The City of New York, to acquire real estate for and on behalf of The City of New York, under chapter 724 of the Laws of 1905, and the acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of The City of New York.

Brief for
Respondent.

The City of New York,
Plaintiff in Error,

against

William Sage, Jr.,
Defendant in Error.

The courts of the State of New York held, in the case of two other parcels taken for the Ashokan

Reservoir, that there was no evidence before them, showing that the land composing this Reservoir Site, was regarded as more valuable, because of its location and adaptability for use as a Reservoir Site, before it was taken by The City of New York.

In Matter of Simmons, 130 N. Y. App. Div., 350, at page 354, the State courts said:

"The proceeding was based upon a demand for the property on the part of the City of New York and its adaptability and availability in conjunction with other parcels for a reservoir site. The record shows that the commissioners understood that these facts were established, and that they went no farther than to hold that the facts could not be considered in forming an opinion of the market value of the property, in the absence of any evidence showing that they had enhanced or affected its value, before it was appropriated by the city.

It was for the commissioners to determine whether the land was really salable and marketable as a part of a reservoir site, and if they so found, the real price or sum that could be obtained for it. The appellant did not prove or attempt to prove that the value of the property in question, or any of the property included in the reservoir site, had been increased by its adaptability or availability for reservoir purposes before the commencement of this proceeding. There is no shadow of evidence of any prior demand for the property as a reservoir site or of any customer who would give more for it for that purpose, or of any circumstance by which the value of the parcel in question, as a part of a natural reservoir site, could be estimated or determined. In the absence of such evidence, it is plain that the ap-

pellant has received the benefit of everything which enhanced the value of his property, except the increase caused by the taking of it by the city."

The evidence before the United States Circuit Court of Appeals was essentially and materially different from that before the State courts.

In the case at bar, the claimant proved, without objection on the part of The City, and beyond contradiction, not only that there had been a number of prior demands on the part of third parties for the Ashokan Reservoir Site, of which the property in dispute is a part, but that these demands had materially increased the market value of the various parcels of property, composing this site.

This is the same evidence which the claimant in the McGovern case, which was before this Court, offered to prove in the State courts, which the State courts rejected, and which this Court refused to take jurisdiction of, on the ground that in the opinion of this Court, the rejection of such evidence by the State courts did not deprive the claimant of his property, without due process of law.

See McGovern vs. The City of New York, 229 U. S., 363.

The City's chief engineer, a hostile witness, Mr. J. Waldo Smith, when subpoenaed in this proceeding, testified that the Ramapo Water Co., which was organized in 1898 or 1899, was organized "on the hope of being able to sell water to The City of New York."

The Ramapo Water Co. was incorporated to supply water to municipalities (p. 84, fols. 250-252). It had made formal applications to supply water to the City of Brooklyn, and, also, to other places, had contemplated acquiring the Ashokan Reservoir Site (p. 84, fols. 251-252), had filed maps, and had made

surveys of portions of that site, covering a part of it, and, eventually, would have filed maps of every portion of the site (p. 84, fols. 251-252).

All this occurred in about 1898 or 1899, and extended up to 1900, about five years prior to the time when The City of New York contemplated acquiring this site.

In the course of acquiring the lands, which composed the Ashokan Reservoir Site, Peter Elbert Nostrand, the agent for the Ramapo Water Co., who subsequently acted as its chief engineer (p. 83, fol. 249) personally bought the lands which formed a part of this site, at as cheap a price as he could obtain them for (pp. 84-85, fols. 252-254). For a number of years, extending probably from 1894 or 1895 to about 1900, he made contracts with the owners of parts of this site, at controlling points, for the purchase of their land, and paid down on these contracts the first payments. Some of these contracts were renewed and extended, upon further payments, for several years (p. 85, fols. 253-254). About the year 1899, a large number of contracts (probably 50 or 60 contracts) were made in this section (p. 84, fols. 254-255).

The owners of these lands, which had been acquired by the Ramapo Co., and of the other lands, which that Company contemplated acquiring, knew that these lands were to be used for Reservoir purposes (p. 84, fols. 254-255). This knowledge had an effect on the price of these lands (p. 85, fols. 254-255). When it became known, throughout that section, that these lands were being purchased for Reservoir purposes, the prices of the remaining land went up to some extent, and the contracts were mostly made within a few days, so as to prevent the rise in value (p. 84, fols. 255-256).

It was well known, throughout that section of Ulster County, that there was a demand for these

lands, for Reservoir purposes (p. 86, fols. 256-257).

There is any quantity of additional evidence in the transcript of record, in the case at bar, bearing on the same point, so that the United States Circuit Court of Appeals said:

"Such evidence has, we think, been given in the case at bar, evidence from which the presumption follows, almost as a conclusion, that with the increase of population in the Valley of the Hudson, the Ashokan Site would inevitably be appropriated, if not by New York, then by some other city or group of cities. There is, in the present case, evidence that the Ashokan Site had long been known, and its availability as a great Reservoir recognized by experts and business men, and efforts to acquire it had, from time to time, been made. If the State courts had passed upon the identical question presented by the evidence in the case at bar, we might feel constrained, in the absence of a controlling authority of the Supreme Court, to follow their decision, but, for the reasons just stated, we cannot find that they have passed upon the precise question involved in the cases relied on by the plaintiff-in-error."

The evidence in the case at bar brings this case directly within the rulings of the State courts, and one of the points urged by the claimant before the United States Circuit Court of Appeals is contained in his brief, at p. 32, as follows:

"POINT V. The Commissioners of Appraisal in the United States Circuit Court, followed the decisions of the State Courts."

A copy of defendant in error's brief is submitted herewith.

Statement.

William Sage, Jr., the respondent in this Court, and the claimant and defendant-in-error in the Court below, purchased the land in question on May 17th, 1909. At that time no proceeding was pending before the courts of New York State for the acquisition of this land.

The City had given notice of its intention to commence such a proceeding, but no such proceeding had been commenced. This was found as a matter of fact, and as a matter of law, both by the Commissioners of Appraisal, by Judge Lacombe, by Judge Noyes, and by the United States Circuit Court of Appeals.

Mr. Sage was and is a bona fide citizen of Orange, N. J., where, at the time he purchased this land, he was residing with his wife and family, and where he had, prior to that time, resided continuously for upwards of six years.

William Sage, Jr., did not purchase this land upon any understanding that he was to give a part of his award to any other person, or persons, but bought the land outright. There was no fraud or collusion whatsoever in the transaction.

This proceeding was removed from the State Court into the United States Circuit Court (now United States District Court) on the ground of diversity of citizenship, William Sage, Jr., being a bona fide resident and citizen of New Jersey, and the City of New York, a municipal corporation and citizen of the State of New York. After the proceeding had been removed, as aforesaid, the City made a motion in the United States Circuit Court to remand the proceeding to the State Court, and after a full hearing, upon the merits, this motion was denied, Judge Noyes holding (pp. 32-33, fols. 96-97) :

"The prior filing of maps and publication of notices indicated only an intention to commence proceedings, which might not have been carried out. The claimant was the owner of the land in question at the time of the commencement of the proceedings, and as a citizen of another State, had the right to remove them to this Court. There is nothing in the record from which fraud or collusion on his part can be found."

In Cyc. of Law and Procedure, Vol. 1, p. 751, under the title "Actions," it is said:

"e. SPECIAL PROCEEDINGS—(1) IN GENERAL. In New York, the presentation of a petition is deemed the commencement of a special proceeding."

Matter of Bradley, 70 Hun., 104; 23 N. Y. Supp., 1127.

Section 3348 of the New York Code of Civil Procedure expressly provides that a special proceeding is not deemed to have been commenced until the petition, upon which the first order, process, or other mandate of the Court may be made or issued, has been presented to the Court.

In Lewis on Eminent Domain, Vol. 2, p. 929, it is said:

"A condemnation case is a special proceeding, and not an action within the New York Code."

See also:

King vs. New York, 36 N. Y., 182;

Matter of Peterson, 94 App. Div., 143;

Matter of Rochester, 102 App. Div., 99.

Lewis further states (Vol. 2, p. 969) :

"If the statute requires a petition, it is indispensable to jurisdiction."

The statute in the case at bar required The City of New York to file its petition in the State Supreme Court, where the land is located.

The mere fact that The City filed some maps, and advertised that it intended to commence proceedings, and thereafter, to file its petition, did not give the State Court jurisdiction until it actually presented its petition to the State Court, which was after Mr. Sage had become the bona fide owner of the land in question.

It followed, therefore, conclusively that Mr. Sage was the owner of this land before The City of New York commenced any proceeding to acquire it in the State Court.

Even if this had not been so, Mr. Sage would have had the right to have removed his claim to the Federal Court, inasmuch as he became the bona fide owner of the property before The City took title, and inasmuch as he had not appeared in the State Court, except for the purpose of having his claim removed.

It is too well known to this Court to require the citation of authorities that a party may remove his case from a State Court, on the ground of diversity of citizenship before he answers in the State Court. The mere fact that an action had been commenced against him would not preclude him from moving his case into the Federal courts.

Even if this were not true, in the case at bar, not only did The City of New York proceed affirmatively, without objection, to submit its case, on the merits, before the Commissioners of Appraisal, but it, also, moved for affirmative relief before

Judge Lacombe, and only after it was defeated, again raised the question of remand.

The action of The City constituted a complete waiver of this question.

Merchants' Heat & Light Co. vs. Clow, 204 U. S., 286-289;

Encyc. of Pleading and Practice, Vol. 18, pp. 391-393-395, particularly p. 393, citing *New Orleans City R. Co. vs. Crescent City R. Co.*, 33 La. Ann., 1273; *New Orleans vs. Seixas*, 35 La. Ann, 37.

In *Black (Dillon) on Removal of Causes*, p. 361, Chap. 18, Sec. 220, it is said:

"But if a motion to remand for want of jurisdiction has been made and overruled, such motion cannot be subsequently renewed; it will be considered as settled."

The United States Circuit Court of Appeals said on this point:

"As pointed out by Judge Noyes, the filing of maps, and the publishing of notices, did not commence any legal proceedings, but at best indicated an intention so to do. That intention might be abandoned or modified, and no actual proceeding to acquire the land in question was commenced until the petition was filed.

"The only reason urged for remanding the case, in the brief of the plaintiff-in-error, is that the land in question was transferred to a non-resident, for the purpose of creating jurisdiction in the Federal courts. Neither fraud nor collusion is charged, but it is asserted that after the State Court had obtained jurisdic-

tion, the controversy was removed, for the sole purpose of securing a tribunal, where a more liberal rule of damages obtains than in the New York courts. This contention cannot be sustained, for the reason already pointed out, that the land was purchased by the defendant-in-error before the condemnation proceedings were begun in the State Court.

"We cannot indulge in conjecture or guess-work. For aught that appears in the Record, the sale to William Sage, Jr., was a perfectly fair, honest and legitimate one."

Not only was the motion to remand, denied on the merits, but long afterwards, when the case was brought to trial, William Sage, Jr., the claimant, was called as the first witness in his own behalf.

He was not asked a single question by The City, as it was known that he was the bona fide owner of this land (p. 37, fols. 109-111).

For the purpose of showing the bad faith of The City in raising this question, reference is made to p. 13 of their brief before the Circuit Court of Appeals, in which they state that, although they regard the farm and building award of \$7,624 as excessive, in view of the fact that the property had just been sold for \$4,500, the cost of the condemnation proceedings, they alleged, is so high, that The City would pay this excessive award, rather than undergo the delay and expense of a new trial.

In this Court, they seek to have the whole case reopened and remanded to the State courts, regardless of expense.

Furthermore, after the judgment in this case had been affirmed by the United States Circuit Court of Appeals, the City made a motion for a stay of all proceedings, pending its application to the said Circuit Court of Appeals, for a rehearing, or, in the event of that Court's refusal to grant a rehearing,

pending its application to this Court, for a writ of certiorari. Its motion for a stay of proceedings was denied, on the ground, among others, that it was made too late. In order that The City might have a fair opportunity to make the applications it desired, counsel for the defendant-in-error, notwithstanding the denial of the City's motion for a stay of proceedings, consented to enter into a written stipulation, which is now in full force and effect between the parties, and which recites that the claimant is willing, in consideration of the payment by The City of the full amounts awarded to him, to protect The City "in case the additional award of Four thousand three hundred and twenty-four and 45/100 (\$4,324.45) Dollars, made for Reservoir availability and adaptability, is reversed, set aside, and disallowed by either of said courts."

The stipulation further provides that The City will pay to William Sage, Jr., the entire amount of his award, upon his giving a Surety Company bond, to secure The City "the repayment of the sum of Four thousand three hundred and twenty-four and 45/100 (\$4,324.45) Dollars, with interest from May 28th, 1909, and Two hundred and sixteen and 22/100 (\$216.22) Dollars, with interest from November 2nd, 1911, in case said additional award for Reservoir availability and adaptability is reversed, set aside and disallowed by either the said United States Circuit Court of Appeals, for the Second Circuit, or the Supreme Court of the United States.

The stipulation in question further provides that William Sage, Jr., expressly stipulates not to urge any right he has, or may have, either in law or in equity, to object to The City's application for a writ of certiorari to the Supreme Court of the United States, upon the ground that payment, as pro-

vided in the stipulation, has been made, but may object on any and all other grounds.

It will be seen, from a mere perusal of the stipulation in question, that The City did not desire to raise the question of remand. In view of the fact that it has done so in its brief, upon this application for a writ of certiorari, it has been necessary for respondent's counsel to refer to this question, and, also, to the stipulation.

Furthermore, a large number of witnesses, who were thoroughly familiar with the value of Mr. Sage's property, testified that the property was fully worth, for agricultural purposes solely, and exclusive of a valuable quarry upon it, \$12,000.00, being more than the total award for all purposes, made by the Commissioners of Appraisal. (Testimony of Sacks, pp. 98-99, fols. 293-297; Van Kleeck, p. 108, fols. 322-323, and other witnesses.)

Two quarry men testified that the quarry upon the property was worth \$1,500.00, thereby making the total value of the property, for farming purposes only, including the quarry, \$13,500.00 (pp. 116-117, fols. 348-350). The fair and reasonable market value of the timber on the property was \$5,037.80 (p. 136, fol. 408). Other witnesses, familiar with the value of the property for farming and quarry purposes, testified in effect as above stated.

Before closing this statement, this Court's attention is called to the fact that there are various incorrect statements of fact on the brief of petitioner, and various isolated fragments selected and quoted from the testimony of various witnesses which if read alone, and apart from the whole context, convey an erroneous and misleading impression. The entire testimony of all these witnesses must be read together, in order to give the Court a correct impression of what occurred. This Court is respectfully requested not to take any notice of fragments

of testimony, carefully selected by the petitioner in this Court. Counsel for the respondent does not desire to waste this Court's time in pointing out these incorrect statements in detail, but will refer to some of them later on.

POINTS.

I.

The alleged error sought to be reviewed by the petitioner, is one relating to the measure of damages, and under the decisions of this Court, should not be reviewed by certiorari.

In *Forsyth vs. Hammond*, 166 U. S., 506, at the end of p. 513, and the commencement of p. 514, this Court says:

"So it has been that this Court, while not doubting its power, has been chary of action in respect of certioraries. It has said:

"It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this Court to require a case, in which the judgment and decree of the Court below is made final, to be certified, can be properly invoked."

The case of *Forsyth vs. Hammond*, *supra*, was cited with approval in *St. Louis, Kansas City & Colorado R. R. Co. vs. Wabash R. R. Co.*, and *City of St. Louis*, 217 U. S., 247, at p. 251.

In *McGovern vs. The City of New York*, 229 U. S., 363, which came up, on error to the Supreme Court of the State of New York, this Court said:

"When property is taken by eminent domain, it equally is recognized that there must be something more than an ordinary, honest mistake of law in the proceedings, for compensation, before a party can make out that the State has deprived him of his property unconstitutionally."

"* * * The present case, of course, does not show disregard of McGovern's rights, or that he was prevented from obtaining substantially any compensation. Even if the plaintiff in error is right, it shows only that the Commissioners and courts of New York adopted too narrow a view upon a doubtful point, in the measure of damages. It hardly even is so strong as that; for the ruling of the commissioners is not to be taken as an abstract universal proposition, *but the judgment concerning this particular case*, found by men, presumably as the plaintiff-in-error says, men of experience, who had or were free to acquire outside information, concerning the general conditions of the taking and the selected site.

"* * * The plaintiff-in-error relies upon cases like *Boom Co. vs. Patterson*, 98 U. S., 403, to sustain his position, that while the valuation cannot be increased by the fact that his land has been taken for a water supply, still it can be by the fact that the land is valuable for that purpose. The difficulties in the way of such evidence, and the wide discretion allowed to the Trial Court, are well brought out in *Sargent vs. Merrimac*, 196 Mass., 171. MUCH DEPENDS ON THE CIRCUMSTANCES OF THE PARTICULAR CASES." We are satisfied, on all the authorities, that whether we should have agreed or disagreed with the commissioners, if we had been valuing the land, there was no

such disregard of plain rights by the courts of New York as to warrant our treating their decision, made without prejudice, in due form, and after full hearing, as a denial by the State of due process of law."

The United States Circuit Court of Appeals said, with respect to the McGovern case:

"The Supreme Court decided that the record did not show that the plaintiff-in-error had been deprived of his property, without due process of law, even if it be assumed that it was error to exclude the proffered evidence.

* * * The question here is not whether the property of the defendant-in-error has been taken without due process of law, but whether the Commissioners, and the Circuit Court, erred in allowing the defendant-in-error damages, based upon the availability of his land for Reservoir purposes. The award was made by Commissioners appointed by the State Court, prior to the removal, and had the amount of \$11,948.90 been awarded for the value of the land, buildings and quarry, it would not, in view of the testimony, have been exorbitant."

If, as this Court says in the McGovern case, the question of valuing land depends, to a large extent, upon the opinions of expert witnesses, upon the judgment of Commissioners of Appraisal, and upon evidence outside of, as well as within the Record, and if the matter is more or less one of discretion and sound judgment on the part of these Commissioners of Appraisal, depending upon the particular facts and evidence before them, how can this Court, under its previous rulings, on applica-

tions for writs of certiorari, review this question of judgment and discretion?

It is respectfully submitted that for this reason, regardless of any other, this application should be denied.

In view of the fact, however, that counsel for The City have, under the various points in their brief, endeavored to discuss the merits of the case, including the several questions of law involved, it may not be amiss to briefly reply to some of their contentions. This brings us to Point II.

II.

There is a large mass of evidence in the Record, as we have heretofore pointed out, showing that the market value of Parcel 733 had been increased, by reason of its availability and adaptability for reservoir purposes, long before The City of New York took title to it under Eminent Domain.

Under Point II of the petitioner's brief, counsel state:

"If there had been a demand for this property for Reservoir purposes, or for any other purpose, which had increased its value, that increase would necessarily be reflected in the value placed upon it by the real estate witnesses called by the claimant. These men who lived in the vicinity, and who had known the property for years, testified to its fair market value, but stated that that value was "exclusive of Reservoir value." Their testimony, however, shows that this Reservoir value which

they had excluded, was not anything that had affected the price at which the property could be sold, as between an owner, not unwilling to sell, and a purchaser, desiring to buy. It was something of which they, although claiming to know the market value of the property, knew nothing, and as to which they stated they were not competent to testify. It is this value which the claimant undertook to prove by the three engineer witnesses."

Nothing is farther from the truth than the foregoing quotation, taken from the brief of petitioner's counsel.

Not one of the agricultural witnesses referred to was asked the market value of the property taking into consideration its reservoir availability and adaptability, because they were called merely to testify to its agricultural value, exclusive of this element, and the questions propounded to them were carefully framed to exclude this element of value. This is well known to petitioner's counsel.

Referring to the testimony of Edwin Burhans, who is not an "engineer witness," but a resident of Kingston, who lived for years at Brown Station, near where the property in question is located (p. 134, fols. 401-402), we find that this witness testified (p. 151, fols. 451, 452 and 453) that the whole of the Ashokan Reservoir Site was divided into territorial sections, which were numbered from one to eighteen consecutively, and as The City acquired first one section and then another, the balance of the Reservoir Site increased in value. This increase in value was on account of the awards that were made by the Commissioners who were first appointed:

"(Fol. 453) and also, on account of all around there, on the outskirts of the Reser-

voir, the property advanced 200% more in price."

This witness further testified (p. 149) that an award was made for the George Ennis property of \$363.32 per acre (fol. 446); that an award of \$301.80 per acre was made for the DeWitt Ballard property (p. 149, fol. 447), which was ordinary farm property; that \$725.00 was paid for one-quarter of an acre of unimproved land at a sale by George Stewart to Edward Risley (p. 150, fol. 449).

See, also, testimony of Virgil H. Winchell (p. 163, p. 170).

Mr. Nostrand, who, although an engineer, had actually purchased land in the Ashokan Reservoir Site, prior to the time The City commenced its proceeding to acquire the land in question, testified (p. 177, fols. 530-531) :

Q. Do you consider the farms there, and other lands, which, together, compose this site, to be of greater valuation than similar farming land, which does not constitute a part of a reservoir site? A. Yes, I should so consider them.

Q. In other words, you consider that land which forms part of a reservoir site, has in it an inherent element of valuation, by reason of its adaptability and availability for reservoir purposes, or water supply purposes, would you not? A. I do, under certain circumstances, yes.

Q. Under the circumstances in this case? A. Yes, sir.

Q. Is this particular parcel in question a part of the Ashokan reservoir site? A. It is.

Q. And would it necessarily have to be used in constructing the Ashokan reservoir? A. It would.

Q. And without its use, the reservoir could not be constructed, could it, which The City of New York is now constructing? A. Not unless there was a great amount of money spent to dike off this particular property.

Q. That expense would be prohibited for all practical purposes? A. It would.

Q. For all practical purposes, this particular parcel of property must necessarily be used as a part of the Ashokan reservoir site? A. Yes.

Q. For the construction of the Ashokan storage reservoir? A. Yes, sir.

Mr. Nostrand produced a large number of contracts, covering property forming a part of this site, which the Ramapo Co. had contracted to buy. All of this is in the Record.

Even the witnesses for The City considered this increase in value, according to their testimony.

James McMillin, one of the City's witnesses, testified (p. 351, fols. 1052-1053) :

A. In placing this value upon the property, I took into consideration that it was part of the reservoir section.

Q. Why did you take that into consideration? A. Because I knew it to be a fact.

Q. You don't know anything about valuing property for such purposes, do you? A. I knew, as a fact, it was part of the system.

Q. You don't know anything about valuing property for such purposes, do you? A. I don't.

Q. How could you then take into consideration something of which you are totally ignorant? A. I say I only take it into consideration, so far as knowing it was part of the reservoir property.

Mr. Barnes (interrupting) : He doesn't state this on a theory, simply he knows it to be so.

Q. How much value did you place upon the property, knowing that? A. I placed no particular value on that.

It is equally untrue, as stated by counsel for the petitioner, that the able, famous, honest and experienced engineers, who testified on behalf of the claimant, to wit: Cornelius C. Vermeule, Robert E. Horton and Peter Elbert Nostrand, testified simply to the proportionate share to which the eighty-six acres of land in Parcel 733 would be entitled, of the entire valuation placed upon them on the submerged 10,000 acres in the reservoir by fantastic speculations, based on so-called imaginary savings, or anything else imaginary.

As Judge Lacombe states in his opinion (p. 483, fols. 1447-1448) :

"The evidence shows that the land in question, together with that of claimant's neighbors, was available as a reservoir site, and that such availability was not confined to the uses of New York City. Apparently, the award is not made on the basis of the value of the reservoir lands to The City of New York alone; had such been the basis, the valuation would have been very much higher, but the Commissioners have taken into consideration, as an element of value, the circumstance that had New York City never gone to this watershed, some other political community or some water company, created by statute, might have been willing to pay more than their value as farming land, for the parcels which would enable it to impound water there."

Cornelius C. Vermeule testified that the fair and reasonable market value of this land was about \$665.00 per acre (p. 193, fols. 578-579).

He testified that this was not the value of the property to The City of New York, but its market value between a willing buyer and a willing seller (pp. 193-194-195).

He testified (p. 194, fols. 581-582) that the value which he placed on the property was based on a saving to The City of \$34,000,000.00, by its taking this site in preference to the next cheapest ones; (p. 194, fols. 581-582), that the use of this site, by which The City saves \$34,000,000.00, gives to each part of the site an inherent element of value, to at least a proportion of these savings; that The City proposes to operate this water supply as a business venture, the same as a private water company would (p. 195, fols. 585-586). He further testified that the ordinary result of such operation is to make a profit (p. 195, fol. 585).

Robert E. Horton (p. 228), an hydraulic engineer of vast experience, resident engineer of the New York State Engineering Department, in connection with the Barge Canal construction, matters of storage, water supply and canals, and consulting engineer of large water and other companies (pp. 228-229-230) testified that the fair and reasonable value of the property in question, at the time The City took title to it, was \$660.00 per acre. He testified that there had been a continually increasing demand for water from this very site.

He testified (p. 234) that unquestionably, the most available use to which these lands could be put was for flowage purposes, for a reservoir for water supply; that a demand for such water had existed for a long period of time, prior to May 22d, 1909, when The City took title to Parcel No. 733; that this demand existed, not only on the part of The City of New York, but on the part of other communities; (pp. 234-235), that available reservoir sites had gradually been used and taken out

of the market, that as the demand for water increased (p. 236, fols. 707-708) and the supply of reservoirs decreased, the remaining reservoir sites enhanced in value (p. 236).

"A. I would consider that it had enhanced the value of reservoir sites locally within a radius of New York. Throughout the State generally, there is a notable increase in reservoir sites within the past ten or fifteen years."

Parcel 733, the Sage property, is a part of the Ashokan Reservoir Site (p. 238).

Some of the States have recognized, by acts of legislation, that reservoir lands are more valuable than other similar agricultural lands, not available and adaptable for reservoir purposes (p. 239). The Mill Acts of Connecticut, Massachusetts and Maine cover this subject, and in Connecticut there is a rule that an additional allowance, over and above ordinary agricultural value, shall be made for reservoir lands (p. 239, fols. 715-716). In Connecticut reservoir land is first valued at its fair and reasonable value for agricultural purposes, and then that value is multiplied by one and one-half, and added to the agricultural value.

In the first annual report of the Board of Water Supply of the City of New York, land in the Ashokan Reservoir Site is valued at \$330.00 per acre (p. 243, fols. 728-729).

The Commissioners of Appraisal, in the case at bar, awarded to this claimant about \$140.00 per acre.

This witness further testified (p. 256) that in the course of his experience, wherever private companies acquired reservoir lands, as soon as a number of parcels were purchased, and the owners of the remaining land became aware that their land

was to be used for reservoir purposes, the price of the balance of the land increased in value.

Mr. Nostrand, the other engineer who testified, also testified to the fair and reasonable market value of the land, and not to its value to The City of New York.

The city officials, and their engineers, made an estimate of the probable cost to be paid for the 15,000 acres contained in the Ashokan Reservoir Site, including the relocation of railroad and riparian damages, at \$520.00 per acre (p. 74, fols. 222-223).

The City did not put on the stand a single witness to controvert this valuation, nor did it introduce a particle of evidence, to show that this property did not have an enhanced valuation in the open market, on account of its being a part of this valuable Reservoir Site, nor did it object to the admission of any of the testimony in question, on the ground of its being incompetent.

There is no question about the law in the case at bar, because the evidence showing previous demands for this site, and for this water, not only on the part of The City, but on the part of other municipalities and private water companies, and its consequent rise in market value, is undisputed and uncontradicted, and the Commissioners of Appraisal followed the law, as laid down by the State courts, as well as that laid down by the United States Supreme Court.

The case at bar falls clearly within both decisions. It is obvious that the valuation which the Commissioners of Appraisal placed upon Parcel 733, was not its value to The City of New York, but merely the fair and reasonable market value of the property, taking into consideration, as an element in its value, the fact that it is adaptable and available to a certain special and profitable use, which

The City is now making of it, and which had, on account of the demands for this property for reservoir and water supply purposes, increased its value in the open market.

It is equally untrue that parcel No. 733 is in a different watershed.

If it were in a different watershed, The City of New York would not have taken title to it in this proceeding. Not only is it in the same watershed, but it is actually a part of the Ashokan Reservoir Site, and was condemned as such.

Yet, in all of the courts below, counsel for the petitioner have repeatedly stated to the Court, as they state upon their brief before this Court, without referring to any evidence or folios, that this property is in a different watershed.

Although they made the same statement before Judge Lacombe and before the United States Circuit Court of Appeals, both of those courts ruled squarely against them on this question of fact, and that Parcel 733 is a part of the Ashokan Reservoir Site, and was condemned as such, is undisputed and beyond contradiction, notwithstanding counsel for the petitioners again reiterating that it is in a different watershed.

Furthermore, counsel for the petitioner make other misleading and erroneous statements in their brief on pp. 29 and 30, in relation to a comparison between the record in the case at bar, and that relating to Parcel 271-A in 130 App. Div., 356.

In matter of Simmons, 130 App. Div., 356, the State Court held that Mr. Vermeule testified in that case to the value of the property to The City of New York.

The case at bar was tried with that decision in view, and great care was taken in asking the questions of Mr. Vermeule in the case at bar, and it clearly appears from his testimony that the valuation placed by him upon Parcel 733 was not its

value to The City of New York, but was its fair and reasonable market value in the open market.

At p. 193 Mr. Vermeule was asked:

Q. Now, is that value, \$57,836.00, the value of this property to The City of New York? A. No. I have not regarded it as the value to The City of New York in any sense in which I have ascribed a special value to it, because it is necessary to The City of New York; but it is the fair value, taking into account all of the surrounding circumstances, and the population which is growing up, increasing and demanding a supply of which, of course, The City of New York is a substantial part.

Q. That is, The City of New York would be one of the customers for this water? A. Yes.

On cross-examination, Mr. Vermeule was asked (p. 198, fols. 593-594):

Q. So that this amount that you have testified to is, in your opinion, the fair market value of this land? A. Yes.

On redirect-examination, this witness was asked (p. 223, fol. 668) referring to the reservoir site:

Q. That market value is not its value to The City of New York, is it? A. Not at all.

Q. Its value to The City of New York would be more than \$34,000,000.00, would it not? A. Unquestionably it would."

No objections were made by the petitioner's counsel to any of the questions asked of this witness, consequently the competency or incompetency of any part of his testimony cannot be raised on appeal.

Assuming, however, that any part of the testimony of this witness is incompetent, the testimony of the other witnesses was clearly competent, and they testified to the fair and reasonable market value of Parcel 733, and did not testify to its value to The City of New York.

The Commissioners of Appraisal did not place upon this property its value to The City of New York, but its fair and reasonable market value in the open market. That is beyond contradiction.

The effort of petitioner's counsel, in claiming the contrary, for the purpose of endeavoring to get this case into this Court, cannot be reconciled with the facts in the record.

III.

The case at bar not only falls directly within the decisions of the State courts, but, also, within the principle laid down in *Boom Co. vs. Patterson*, 98 U. S., 403.

The *Boston Chamber of Commerce vs. Boston*, 217 U. S., 189, and *U. S. vs. Chandler-Dunbar Co.*, 229 U. S., 253, have no application.

In *Boston Chamber of Commerce vs. Boston*, it appears from the report of the Hon. Robert R. Bishop, the learned justice, before whom the case was tried, that the Boston Chamber of Commerce owned, in fee, certain property, situated in India Street, upon which there was a private way, known as "Central Wharf Street," which was afterwards laid out as an extension of Milk Street. The Chamber of Commerce had erected a building on its property.

The Central Wharf & Wet Dock Corporation had

conveyed this property to the Chamber of Commerce by a deed, which contained an express reservation to the grantor, its successors and assigns, of all rights of way, light and air, over the part of the premises which was known as the private way. This private way was an easement on the premises, in favor of the grantor and its successors. This private way, however, had been used as a street. Thereafter, and,

"On March 21st, 1901, the Board of Street Commissioners of the City of Boston, duly and legally laid out said private way, known as "Central Wharf," or "Central Wharf Street," from India Street to Atlantic Avenue, as a public way, and as an extension of Milk Street. * * * The Boston Five Cents Savings Bank held a mortgage on the premises."

The three parties interested in the land, to wit: The Chamber of Commerce, the owner; the Wet Dock Corporation, the grantor and owner of the easement, and the Five Cents Savings Bank, the mortgagee, entered into a written stipulation, among themselves, agreeing that damages might be awarded in a lump sum to all the parties in interest, and that they should not be apportioned. This stipulation was filed in Court, upon the trial of the proceeding.

In other words, by such a stipulation, they attempted to extinguish the easement.

It was perfectly clear in that case that by making a public street out of a private way, which had been used for all practical purposes as a public street, no very substantial damage could possibly be done to the owner of the property, which was subject to the easement, unless it could be held that the easement could be extinguished by agreement between the parties in interest.

The City of Boston naturally objected to such a stipulation, and absolutely refused to assent to it. It appears from the report of the learned Judge in that case, as follows :

“The petitioners contended and asked the Court to rule and to instruct the jury (1) that the damages were to be assessed as of the date of the order laying out the street, and that the only persons who could recover damages on account of such laying out were the persons interested in the land at that time; that as the petitioners together owned the entire title to the 2955 square feet of land so taken for said street, and as they had filed in court a stipulation that the damages might be awarded to the petitioners in a lump sum and were not to be apportioned between the petitioners by the jury, the petitioners were entitled to recover the full, fair market value of the property taken, and they offered competent evidence tending to show that such market value was \$60,000; (2) that the petitioners were entitled to recover the full, fair market value of the land taken, estimating it as if it were an entire estate and as if it were the sole property of one owner in fee simple; (3) that even if, as a matter of law, the Central Wharf & Wet Dock Corporation was not entitled to recover any damages for or on account of said taking, then the other petitioners jointly, or the Chamber of Commerce alone, were entitled to recover the full market value of the property taken, estimating the same as if the land taken were, at the time of the taking, the sole property of one owner in fee simple and unincumbered.

“But the petitioners contended and asked the Court to rule that if the statutes under which these proceedings were brought were to be con-

strued as contended for by the respondent, or so as to deprive the petitioners of the right to recover the full, fair market value of the property taken, the statutes as so construed would be unconstitutional under the constitutions of the Commonwealth and of the United States of America, and particularly and especially under the fourteenth amendment of the constitution of the United States of America, and they contended that such construction of the statutes was erroneous.

"I declined to rule as requested by the petitioners, * * * and I ruled that the statute as so construed would not be unconstitutional either under the constitution of Massachusetts or under the constitution of the United States, and I directed a verdict for the petitioners for the sum of \$5,000, without interest, which was returned accordingly, and at the request of the parties I report the case to the Supreme Judicial Court for the Commonwealth."

It clearly appears, therefore, that the questions involved in that case were questions affecting the title to the property, affecting the construction of certain statutes of Massachusetts, and of the effect of a stipulation as bearing upon the question of title and damages. The opinion in that case must be read in connection with the facts.

It is unnecessary to distinguish all of the other cases cited by counsel for the petitioner. They have no application to the facts in the case at bar, where the evidence was entirely different.

Counsel for the respondent refers this Court to his brief for the respondent and defendant-in-error, before the United States Circuit Court of Appeals, a copy of which is submitted in opposition to this application.

IV.

This was a controversy between citizens of different states, properly removed from the State court to the Federal courts.

We have discussed the evidence on this point at length at the beginning of this brief. All of the courts below found on the merits, after a full discussion, upon the hearing of various motions, and upon all of the evidence, that William Sage, Jr., was at all times a bona fide citizen of New Jersey, that he had purchased the property in question and was the sole owner of it, and that there was no fraud or collusion whatsoever.

All of the lower courts also found that he had purchased this property, before this proceeding was commenced.

All of the evidence which was offered upon the motion to remand is not in the Transcript of Record, and for this reason this question is not before this Court.

Furthermore, the stipulation which was entered into between the parties, pursuant to which Mr. Sage has been paid, precludes this Court from considering this question, even if it were before it.

It is evident that counsel for the petitioner must know this fact, but simply raise this question for the purpose of insinuating that Mr. Sage was not a bona fide owner of the property in question.

The courts below, on all of the evidence, squarely held that Mr. Sage was the sole owner of this property, that no-one else had any interest whatever in the property, that the award belonged absolutely and solely to Mr. Sage, and yet they are endeavoring to insinuate that Mr. Sage was not the bona

fide owner of this property, by stating under "Point III" in their brief, that there was not a controversy between citizens of different States.

Without going further into the various questions involved, counsel refers to his brief before the United States Circuit Court of Appeals, which is herewith submitted.

IV.

The decision of the United States Circuit Court of Appeals is not in conflict with the decisions, either of this court in the McGovern case, or of the State courts, but, on the contrary, holds that the evidence in the case at bar is essentially different from that before the State courts, and on the evidence in the case at bar, the Commissioners of Appraisal were justified in making the award they did, and this court should not review the decisions of the Circuit Court of Appeals, and of Judge Lacombe, and of the Commissioners of Appraisal, on a question of fact, evidence, judgment and opinion.

Respectfully submitted,

EDWARD A. ALEXANDER,
Attorney for Respondent.

Supreme Court of the United States.

In the Matter

of

The Petition of The City of
New York for a writ of
certiorari to the United
States Circuit Court of Ap-
peals for the Second Circuit
in the case therein entitled:

In the Matter

of

The Application and Petition
of John A. BenseL, Charles
N. Chadwick and Charles
A. Shaw, constituting the
Board of Water Supply of
The City of New York, to ac-
quire real estate for and on
behalf of The City of New
York, under chapter 724 of
the Laws of 1905, and the
acts amendatory thereof, in
the Town of Hurley, Ulster
County, New York, for the
purpose of providing an ad-
ditional supply of pure and
wholesome water for the use
of The City of New York.

Brief for
Petitioner.

The City of New York,
Plaintiff in Error,

against

William Sage, Jr.,
Defendant in Error.

This is an application for a writ of certiorari
directed to the Circuit Court of Appeals, Second

Circuit, to review a judgment of that Court, affirming the judgment of the United States Circuit Court for the Southern District of New York, and holding that the value of a parcel of land, taken for the Ashokan Reservoir was increased by reason of adaptability for reservoir purposes.

The Courts of the State of New York held as to two other parcels taken for the Ashokan Reservoir where increased value was claimed by reason of adaptability for reservoir purposes that:

"It is only when it is shown that it has a *market value* for some particular use that the availability and adaptability of the property to the use can be taken into consideration by the Commissioners in determining its fair market value" (130 App. Div., 350; *affd.*, 195 N. Y., 573).

And

"The question, therefore, is not whether the property is particularly adaptable for the special use, but whether purchasers can be found who would pay more for it because of its adaptability to the use" (130 App. Div., 356; *affd.*, 195 N. Y., 573).

The judgment of the State Court in the latter case was affirmed by this Court in *McGovern vs. The City of New York*, 229 U. S., 363.

The Circuit Court of Appeals on essentially the same evidence, admitted and afterwards stricken out in the case reported in 130 App. Div., 356, and rejected in the first instance in the case reported in 130 App. Div., 350, says in its opinion:

"There is in the present case evidence that the Ashokan site had long been known and its availability as a great reservoir recognized by

experts and business men and efforts to acquire it from time to time been made. If the State courts had passed upon the identical question presented by the evidence in the case at bar, we might feel constrained, in the absence of a controlling authority of the Supreme Court, to follow their decision, but for the reasons just stated, we cannot find that they have passed upon the precise question involved in the cases relied on by the plaintiff in error. In these circumstances we deem it our duty to follow the case of Boom Company *vs.* Patterson, 98 U. S., 403, which holds, in substance, that the value of the land in question is increased because of its availability as a reservoir site."

Statement.

The above-entitled proceeding was instituted in the Supreme Court of the State of New York pursuant to chapter 724 of the Laws of 1905 of that State and the acts amendatory thereof, for the purpose of acquiring real estate to construct a reservoir to secure an additional supply of pure water.

The statute provides for the filing, in each county in which any of the real estate is located, of maps upon which should be laid out and numbered the various parcels of real estate to be taken, and for the application, after such filing, to the Court upon six weeks' notice, for the appointment of Commissioners of Appraisal. The notice consists of public signs on the property and extensive newspaper advertising (sec. 8).

Owing to the great area to be taken for the Ashokan Reservoir, over 15,000 acres, it was divided as permitted by the statute (sec. 5), into sections and application for the appointment of Commissioners of Appraisal was made for the respective sections

from time to time. The map of the first section was filed in Ulster County, January 31, 1907, and those of the other sections, from 2 to 14, inclusive, at different dates, between that time and March 4, 1909, when the map of section 15, which embraces Parcel 733, was filed in Ulster County. Six weeks prior to May 22, 1909, public notice was given that on that date application would be made for the appointment of Commissioners of Appraisal for section 15. At the time of the filing of the map and the publication of the notice of the application for the appointment of Commissioners of Appraisal, the record owner of Parcel 733 was Solomon T. De Lee, a citizen of the State of New York. In consideration of the sum of \$4,500 (fol. 1031), DeLee conveyed the property to William Sage, Jr., the defendant in error herein, on May 17, 1909, five days prior to the date noticed for the hearing in court of the application for the appointment of Commissioners of Appraisal.

On the 22d day of May, 1909, the application was granted and the Commissioners appointed by the Court took, subscribed and filed their oaths of office in the office of the Clerk of the County of Ulster, on the 27th day of May, 1909, and certified copies in the office of the Clerk of the County of New York, on May 28, 1909. Section 11 of the Act expressly provides that, upon the filing of the oaths as aforesaid, the City of New York shall become seized in fee of the parcels described in the petition.

On the 29th day of April, 1910, upon the petition of William Sage, Jr. (fol. 25), that he was a citizen of New Jersey and the owner in fee of Parcel No. 733 an order was issued by the Supreme Court of the State of New York removing the proceeding as to that parcel to the United States Circuit Court (fol. 43).

On October 31, 1910, the owner made a motion in the United States Circuit Court for an order appointing Commissioners of Appraisal (fol. 49) and, on November 4, 1910, the City of New York made a motion for an order remanding the proceeding to the Supreme Court of the State of New York (fol. 73).

Circuit Court Judge Noyes denied the motion to remand (fol. 98) and held that the removal of the proceeding from the State Court included the order appointing Commissioners of Appraisal, and denied the motion for the appointment of new Commissioners (fol. 98).

The case came on for trial before the Commissioners and there was offered in evidence a deed dated August 3, 1907, conveying the property to Frank Burhans, a deed dated August 24, 1908, in which Frank Burhans and wife conveyed the same property to Solomon T. DeLee, and a deed dated May 17, 1909, in which DeLee conveyed the property to William Sage, Jr., the defendant in error (fol. 105), the purchase price being \$4,500 (fol. 1031).

On behalf of claimant the following real estate witnesses were called:

John H. Sacks testified that he was familiar with Parcel No. 733 and had been for fifteen years (fol. 285). That he had examined it for the purpose of estimating and testifying to its fair and reasonable market value (fol. 293). That its market value, exclusive of quarry and reservoir value, was \$12,000 (fol. 295). On cross-examination he was asked:

"Q. What is this amount that you have given of \$12,000?

"A. I think this its the fair market value of this farm.

"Q. What it would bring if it were in the market?

"A. Yes, sir" (fol. 306).

John B. Van Kleeck testified its fair and reasonable market value was \$12,000 (fol. 322), exclusive of quarry and reservoir value; that he is not an expert on any one of these subjects (fol. 323).

Elmer Molineaux testified that the fair market value of the property was \$13,500 (fol. 348), and subsequently added "exclusive of reservoir." On cross-examination he was asked (fol. 353):

"Q. Mr. Molineaux, you stated that you had valued this land at \$13,500 exclusive of reservoir value?

"A. Yes, sir.

"Q. Did you say that?

"A. I did.

"Q. How did you know that?

"A. I heard them say so; I know nothing about that.

"Q. At any rate you did not value it for reservoir purposes?

"A. I did not.

"Q. The reason that you made that statement was because you heard some talk about reservoir purposes, you say?

"A. Yes, sir."

William Haven testified that a fair and reasonable value of the property, exclusive of any element of reservoir or quarry value, was \$12,500 (fol. 365).

Edwin Burnhans testified that its fair market value, exclusive of reservoir element and quarry value, was \$14,112 (fol. 413); that he was not competent to testify to the reservoir element of value

(fol. 410). On his redirect examination (fol. 451) he was asked:

"Q. A great deal of other property was condemned by The City of New York from time to time in condemning the Ashokan site, was it not?

"A. Yes, sir.

"Q. The whole of the Ashokan Reservoir site was divided into territorial sections, was it not?

"A. They were.

"Q. And they were numbered from one to eighteen consecutively, were they not?

"A. Yes.

"Q. And each one of these Commissioners had to pass upon the value of the property and damages for the rights taken within its territorial section, did it not?

"A. They were appointed for that purpose, yes.

"Q. And as The City of New York first acquired one section of this land and then another, did the balance of the reservoir site increase or decrease in market value?

"A. Well, it certainly should have increased.

"Q. Do you know as a matter of fact which way it went?

"A. We did not consider it in making our valuation—did not consider that. But there is no question but what the last parcel was worth a great deal more than the first.

"Q. Was that on account of the awards that were made by the Commissioners who were first appointed?

"A. On account of that and also on account of all around there, on the outskirts of the reservoir the property advanced 200 per cent. more in price.

"Q. After The City of New York had acquired title to the first section of this property the owners who owned the balance of this reservoir site knew that their property was taken for reservoir purposes, did they not?

"A. They did.

"Q. And held it at a higher price, did they not?

"A. Yes, sir.

Walter Lee testified to the value of the quarry (fol. 480).

Virgil H. Winchell testified that he did not know anything whatever about the valuation for reservoir purposes and testified to the value of the property solely for farm purposes, exclusive of the value of the quarry (fol. 492).

In addition to the above witnesses claimant called three engineers, expert witnesses, Cornelius C. Vermeule, Robert E. Horton and Peter E. Nostrand.

Mr. Vermeule placed the market value at \$57,836 (fol. 564). He arrived at this valuation by first valuing the Ashokan Reservoir Basin as a whole for reservoir purposes, by making a comparison between the cost of obtaining water from four other available sources (fol. 565). This valuation is based upon the saving to The City of New York by taking the Ashokan reservoir site in preference to four next cheapest available ones (fol. 565). By this method of valuation he fixed the intrinsic value of the whole ten thousand submerged acres of the reservoir site as \$34,000,000 (fol. 576), and the proportionate value of the eighty-six acres embraced in parcel 733 at \$57,836 (fol. 577).

On his direct examination he testified:

"Q. These figures are the savings to the City of New York?

"A. Yes" (fol. 581).

On cross-examination:

" Q. This amount that you have testified to as the fair market value of parcel 733 is the value of the land embraced in that parcel used in connection with the rest of the reservoir site?

" A. Yes, practically " (fol. 678).

Mr. Horton testified that the value of the parcel 733 was \$57,083. He said he used two methods in arriving at his value. By the first he says he took the average of awards that had been made by Commissioners for other parcels which he assumed was their value for agricultural or residential purposes, which gave him \$330 an acre, and that he was of the opinion that such lands would be worth twice that amount for reservoir purposes, using his own language—

" Multiplying \$330 by two gave me \$660 per acre, which is the figure I finally used " (fol. 696).

His second method he testified consisted

" in determining how much a private corporation or individual, having a market for the water which could be supplied from this drainage basin at a fair rate or at a rate less than it would cost the City, could afford to pay for these lands for reservoir purposes and, at the same time, do business at a reasonable and substantial profit " (fol. 697).

Mr. Nostrand arrived at his valuation by taking a statement made by Commissioner Chadwick as to the profit which would be made from an enterprise of this character and the estimate of Chief Engineer Smith of the Board of Water Supply of The City of New York as to the cost of the Ashokan reservoir, and figured out what he considered the pro-

portionate part that should be attributed to parcel 733 (fols. 788-796). The following appears in his direct examination (fol. 797) :

" Q. In other words that is the basis of the theory that The City of New York is saving the large amount of money by using this site in preference to any other site?

" A. Yes.

" Q. By saving this money it makes the entire profit as a business enterprise?

" A. Yes.

" Q. And a part of these profits is contributory to this reservoir site which forms the basis of the entire enterprise?

" A. Yes.

" Q. In this business enterprise it is necessary to have this reservoir site?

" A. Yes.

" Q. It is also necessary to have the necessary labor and materials to build a reservoir and the aqueducts and other appurtenances?

" A. Yes.

" Q. You know the actual cost of the labor and materials that go into the construction work?

" A. Yes.

" Q. And we know according to Commissioner Chadwick what the net profits per annum would be?

" A. Yes.

" Q. And you have simply figured up the proportionate part that should fairly be attributed to this land?

" A. I have."

The claimant also offered in evidence certain proceedings in 1893-6 of the Common Council of the City of Kingston, New York, and its committees relative to obtaining a source of water supply from

Bishop Falls and Esopus Creek (fol. 1255). The City of Kingston rejected this proposed plan and purchased the then existing water works of the Kingston Water Company (fol. 1394).

Claimant also offered in evidence the record of contracts made to purchase lands of the Ramapo Company in 1899 (fol. 240), which contracts, however, were permitted by that company to lapse (fol. 228).

It was stipulated and agreed that the present claimant paid \$4,500 in cash as the purchase price of Parcel No. 733 (fol. 1031).

For The City of New York three witnesses testified that the value of the parcel was \$5,500 (fols. 972, 1035 and 1085, respectively), of which \$2,845 was for the buildings, and one witness who testified that the quarry had no value (fol. 890).

The Commission made an award of "The sum of \$7,624.45 for land and buildings and the further sum of \$4,324.45 for reservoir availability and adaptability being a grand total of the sum of \$11,948.90" (fol. 1424), and recommended that claimant be allowed 5 per cent. of the award for legal fees and expenses (fol. 1425), and the further sum of \$1,372.31 for witnesses (fol. 1426).

The City moved to confirm the report as to the land and buildings only and not for reservoir availability, witness fees and counsel fees (fol. 1438) and claimant moved to set aside the report *in toto* (fol. 1429). The report was confirmed as made by the Commissioners by Judge Lacombe (fol. 1449).

The City of New York sued out a writ of error to the Circuit Court of Appeals for the Second Circuit claiming that the Court had erred in the following respects:

I.—That the Court erred in removing this proceeding from the State Court to the United States Court.

II.—That the Court erred in holding that there was evidence before the Commissioners of Appraisal of any value for reservoir availability and adaptability except to the condemning party, The City of New York.

III.—That the Court and the Commission erred in holding that the claimant is entitled to compensation, both for reservoir availability and adaptability, and for the value of the farm buildings and quarry; and that these two values are contradictory and that the claimant is not entitled to the sum of contradictory values.

IV.—That the award is grossly excessive.

V.—That in arriving at their award the Commissioners of Appraisal proceeded on an erroneous theory.

VI.—That the award of the Commissioners of Appraisal in the Catskill Water Supply proceedings cannot be confirmed until a motion for confirmation is duly made, and that no motion for the confirmation of that part of the award as to reservoir availability and adaptability was made by either party.

VII.—That the claimant in this proceeding took the property subject to the rule as laid down by the highest court of the State of New York, and that it was error to make an award in disregard of that rule.

VIII.—That the only question before the Court was whether the report should be rejected *in toto* or the land and building value confirmed and the rest of the report rejected and that the Court erred in confirming the whole report.

IX.—That the Court erred in holding that the rule laid down in *Boom Co. vs. Patterson*, 98 U. S., 403, applied to this parcel in this proceeding, and was the proper method of determining value, and that if said rule did apply, the Commissioners of Appraisal herein erred in that they did not follow it.

The case came on for hearing on November 14, 1912, before Coxe and Ward, Circuit Judges, and Holt, District Judge.

The opinion of the Court was delivered by Coxe, J., July 15, 1913, affirming the judgment of the lower court. The opinion of the Court states that its decision was withheld pending the decision of this Court in *McGovern vs. The City of New York*. The petition for rehearing was presented (p. 528) and denied without opinion.

POINTS.

I.

The Circuit Court of Appeals erred in holding this case within the principal laid down in *Boom Co. vs. Patterson*, 98 U. S., 403.

Boston Chamber of Commerce vs. Boston, 217 U. S., 189.

U. S. vs. Chandler-Dunbar Co., 229 U. S., 53.

McGovern vs. The City of New York, 229 U. S., 363.

The additional award for reservoir availability and adaptability was upheld by both the Circuit

Court of Appeals and the lower court on the authority of the Boom Company case. This Court in that case held that Patterson, who owned some islands in the Mississippi River, about an eighth of a mile from its westerly bank, which when connected with the mainland would form a boom of immense capacity for holding logs, was entitled to have their availability for boom purposes considered as an element in estimating the value of his land.

This decision was based on the rule there laid down that in determining the value of land appropriated for public purposes, the proper inquiry was:

“What is the property worth in the market, viewed not merely with reference to the use to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses.”

In other words, that case held that the inquiry as to the value in a condemnation proceeding is not to be restricted to a consideration of the use which is, in fact, made of the land, but to any other or profitable use to which it is adapted.

This rule, however, must be taken in connection with the well-settled rule that the value of the use to the condemning party is not the legal measure of damages.

Five Tracts of Land vs. U. S., 101 Fed., 661.

U. S. vs. Honolulu Plantation Co., 122 Fed., 581.

To fall within the rule laid down in the Boom Company case the land must be of such character in itself or subject to such surrounding conditions as to be at once fairly and reasonably available for such other or more profitable use, and such use

must be one that can be availed of by its owner or anyone similarly circumstanced as a physical or financial possibility. In other words, before such other use can be considered as an element of value, it must be shown that there is some special feature of the particular parcel taken, in its location or in the configuration of its surface or the character of the soil or the like, or in relation to surrounding conditions and present circumstances, whereby it could reasonably and with advantage be employed by the owner for some purpose other than that for which he was using it.

That the property may be adapted to such other or more profitable use in conjunction with other lands to be acquired by some gigantic corporation organized for the purpose, or by some great municipality, cannot be considered. It must be so available to the owner or any other individual under ordinary conditions; for the very reason and purpose of eminent domain is that aggregations of capital in the form of corporations may undertake and carry out great works for the public benefit which are not possible to individuals.

Furthermore the basis for a claim of additional compensation on account of adaptability and availability to proposed purposes is the theory that the property may thereby be made more profitable in the hands of the condemning party, and that by such taking the owner is deprived not only of his property as it stands, but also of some of the gains which will accrue by reason of its use for the purpose for which it is taken, which is in effect saying that the claim is for gains prevented.

It follows, therefore, that before such a claim can be sustained it must be established that had the property not been taken the owner could, and

in all probability would, either himself or in combination with others, have used the property in the same manner as the condemning party expects to use it and thus acquire the gains himself.

If the owner could not in any event make the same profitable use of the property as the condemning party, then it is manifest that no gains on his part have been prevented and there is no ground for his claim.

Where land in its existing state may be at once used and is presently available for the very purpose sought not only to the condemning party, but to the owner or any owner similarly circumstanced, the Courts have, in some exceptional cases, allowed increased compensation for such [present special availability.

Such was the Boom case, the lands condemned were presently available for the purpose sought. The condemning party, which was a private corporation and seems to have had the right to acquire land by eminent domain, took the property for private business purposes. There was nothing to show that the owner had not the same right as well as ability to carry on the Boom business as had the petitioner, nor was there any reason why he could not do so.

But there is no authority holding where the land, taken by itself or in conjunction with other lands to be acquired, may be made available and adaptable for a use by the expenditure of money or labor, and thus its existing form changed into something different, that enhanced damages can be given as increased value by reason of its general adaptability for the purpose for which it has been condemned.

To construct a reservoir to supply water for a great city the primary requisites are land upon which to build the reservoir, water with which to fill it and an elevation sufficient to accomplish the delivery and distribution of the water. With the proper elevation the amount of land to be taken would depend upon the rainfall, the watershed and the amount of water that the catchment area would supply compared with the amount that it was desired to impound. These factors would determine the location of the dam and its height and the height of such dikes as would be necessary, so that the question as to whether any particular parcel of land would be required as part of the reservoir would depend, not only upon the physical conditions but upon the necessities of the condemning party. The parcel of land lying within the confines of the area necessary for the reservoir as determined by the physical conditions and the necessities of the condemnor may be said to be adaptable simply because it is land located where it is, but it has no special adaptability for particular use and can only be used in connection with the rest of the land within the site selected and by the expenditure of enormous sums of money for the erection of the dams and dikes. There was taken for the Ashokan Reservoir some 15,000 acres, or over 23 square miles of land. By expending \$18,000,000 for dams and dikes, the city makes the 15,000 acres a receptacle for holding water. This 15,000 acres of land was made up of farms and small buildings, business places, churches, schools, cemeteries, railroad stations and the roadbed of railroads. Can it be said that each and every one of these holdings was adaptable for reservoir purposes and entitled to be so valued under the Boom Company decision? The absurdity of the claim that the owner of one of these parcels himself or in combination with the others could utilize his property for reservoir pur-

poses is well set forth by Betts, *J.*, in his opinion confirming the award made for parcel 83, section 3, Ashokan Reservoir (58 Misc., 581), where at page 596 he says:

"There will be in the land taken by the Ashokan reservoir, I am informed, about one thousand parcels of land. Many of these parcels have more than one owner, one before me has tight tenants in common. Many others of them have lienors, tenants and different interests connected with them, which must be acquired by any persons desiring to create a reservoir there. There are easily an average of two persons interested in each of these parcels of land. In order to make this parcel eighty-five available as a reservoir the consent of these other owners or persons interested must be obtained. Many of these owners are persons under age or otherwise incompetent, and from the nature of things could not consent nor would anyone be authorized to consent for them with the owner of parcel No. 85, that this whole section should be made into an immense reservoir. The tract—the whole proposed reservoir site—contains numerous cemeteries in which deceased persons have been interred. Such properties are inalienable, and no one could give consent to their forming part of a reservoir site. In addition there are many school-houses and churches, the owners and congregations of which it is reasonable to assume would embrace people residing outside of the reservoir district, whose consent would have to be obtained to the use of this property for a reservoir site and in some instances legislation would be necessary. There are miles of public highways in this section which requires statutory authority to close for the purpose of

a reservoir site and to close which would require the consent of many people outside of the reservoir district. Recollecting that there is no water upon this parcel of land which is available for filling such a reservoir as is contemplated in the offer here, recourse must be had to the Esopus Creek which runs through this immense proposed reservoir site containing some 8,000 acres, and from which stream and its tributaries the water for filling this dam is expected to be obtained, so even after having obtained the consent of the riparian owners along this Esopus Creek in the proposed reservoir section for the construction of this reservoir, there is still no water available to fill it. 'Running water in natural streams is not property and never was' (City of Syracuse vs. Stacey, 169 N. Y., 231-245). Hence these riparian owners do not own the water in the Esopus. The Esopus Creek empties into the Hudson River some twenty-five or thirty miles below where the City of New York proposes to erect its dam, or where if a combination of the owners of land was affected their dam would be erected. Each of the riparian owners on each side of that twenty-five or thirty miles of stream has a right to the use of this water in the way in which it is now running and always has run. So the consent of all of these riparian owners would be necessary to construct a similar dam or any kind of a dam which would impound the large body of water which is proposed to be impounded here. Easily one thousand people and probably many more would be interested in that proposition. If their consent was obtained and the dam constructed and the water impounded still so large a body of water is not successfully marketable by the glass, pail or

car-load. There is only one market for it and that is the City of New York, some ninety odd miles distant. Assume that the consent of all those parties owning lands through which the proposed aqueduct is to run could be obtained to the construction of an aqueduct similar in its nature to the one that is proposed to be constructed by the City of New York, another army of people must be consulted with probably other infants and incompetents who cannot consent so that many hundreds of people more would be required to give their consent to this proposed dam, as about two hundred parcels are in the Ulster County division of the Aqueduct. The offer on the part of Elizabeth Hogan does not contain any statement that she is able, ready and willing to furnish the millions of dollars required to erect this dam and aqueduct, pay these riparian owners and carry this water to New York, so that something more than consent is necessary. For these reasons among others it seems to me that the attempt to show that this great proposed reservoir and aqueduct could have been constructed by any possible combination open to the residents and land-owners there before the condemnation by any suggested method that has come to my attention seems entirely the product of a fertile imagination, or that (which is the true test) such a proposed combination and construction or the right to combine and construct could have added in any way to the market value of a farm, wood lot, residence or building lot in Section No. 3, is altogether unlikely. It seems fanciful and speculative in the extreme. Nothing approach-it has been called to my attention."

The fact that the necessities of The City of New York made it necessary to construct a reservoir of

sufficient capacity to furnish 386,000,000 gallons of water per day (fol. 206) is the only thing that made necessary the taking of many of the parcels of land acquired for the Ashokan Reservoir. Of these 386,000,000 gallons of water per day, however, only 250,000,000 gallons can be obtained from the Esopus Creek (fol. 198).

The plans of The City of New York contemplate bringing 136,000,000 from the Schoharie watershed in Schoharie County by means of a tunnel through the mountains and storing and delivering it through the Ashokan Reservoir (fol. 206). Had the City constructed a reservoir to store only such water as can be obtained from the Esopus, it would have required a reservoir only a little more than half the size of the Ashokan Reservoir and parcel 733, the Sage parcel here under consideration, would not have been necessary for such purpose (fol. 608).

How then, under any circumstances, can it be said that the Sage parcel was adaptable for reservoir purposes when the water which makes its taking necessary as a part of the reservoir, must be procured from another watershed at an additional expense of millions of dollars?

Furthermore, as parcel 733 now before this Court for consideration has no adaptability for a reservoir by itself and is simply one of more than a thousand parcels that has many different titles that go to make up the Ashokan Reservoir, it is not understood how it can be valued together with all the other parcels for reservoir purposes under the decision of this Court in *Boston Chamber of Commerce vs. City of Boston*, *supra*. That was a proceeding in the Massachusetts courts to assess damages caused by the laying out of a street where the Chamber of Commerce owned the fee of the land

taken, the Central Wharf & Wet Dock Corporation owned an easement of way, light and air over the land in question and the Boston Five Cent Savings Bank held a mortgage on the land, subject to the easement. The three owners filed an agreement in the case that the damages might be assessed in a lump sum to which the City of Boston refused to assent. It was agreed that, if the owners were right, the damages should be assessed at \$60,000, but that, if the City was right, they should be \$5,000. The judge before whom the case was tried ruled in favor of the City of Boston and this ruling was sustained by the Supreme Court of Massachusetts (195 Mass., 338). The case was brought to this Court on a writ of error to the Supreme Court of the State of Massachusetts.

The plaintiff in error claimed that the market value of the "locus" of the land taken for the street at the time of the taking was \$60,000, and that under the authority of *Boom vs. Patterson*, the owners in fee simple of the land unencumbered were entitled to recover that amount; that the right of the petitioners to recover the fair market value of the land was not lost because of the fact that there was more than one owner, nor by reason of the fact that the entire title was held by different owners, who owned different interests. This Court in its decision said:

"The Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unincumbered whole when it is not held as an unincumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained. We re-

gard it as entirely plain that the petitioners were not entitled as a matter of law to have the damages estimated as if the land was the sole property of one owner."

The principle there laid down was applied by this Court in *U. S. vs. Chandler-Dunbar Co.*, *supra*, where the Court said in disallowing an award for strategic value:

"This allowance has no solid basis upon which it may stand. That the property may have to the public a greater value than its fair market value affords no just criterion for estimating what the owner should receive. It is not proper to attribute to it any part of the value which might result from a consideration of its value as a necessary part of a comprehensive system of river improvement which should include the river and the upland upon the shore adjacent. The ownership is not the same. The principle applied *Boston Chamber of Commerce vs. Boston*, 217 U. S., 189, is applicable."

In the *Minnesota Rate Cases*, 230 U. S., 352, this Court, referring to an estimate of the value of the right of way of a railroad based on the cost of its reproduction and of the claim that the railroad company would have to pay more than its fair market value, said, at page 451.

"It is urged that, in this view, the company would be bound to pay the 'railway value' of the property. But supposing the railroad to be obliterated and the land to be held by others, the owner of each parcel would be entitled to receive on its condemnation, its *fair market value* for all its valuable uses and purposes. *United States vs. Chandler-Dunbar Water Power Company*, decided May 26, 1913; 229

U. S., 53. If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. *Mississippi, etc., Boom Company vs. Patterson*, 98 U. S., 403; *Shoemaker vs. United States*, 147 U. S., 282; *United States vs. Chandler-Dunbar Company*, *supra*. But still the inquiry would be as to the fair market value of the property; as to what the owner had lost and not what the taker had gained. *Boston Chamber of Commerce vs. Boston*, 217 U. S., 189, 195.

"The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of the purpose for which it was taken; or an increase over its fair market value, by reason of any added value supposed to result from its combination with tracks acquired from others so as to make it a part of continuous railroad right of way held in one ownership. *United States vs. Chandler-Dunbar Company*, *supra*; *Chamber of Commerce vs. Boston*, *supra*."

In *McGovern vs. The City of New York*, *supra*, which involved an award made for another parcel making up the site taken for the Ashokan Reservoir, this Court said, at page 372:

"The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. *Boston Chamber of Commerce vs. Boston*, 217 U. S., 189-195. In estimating that probability the power of effecting

the change by eminent domain must be left out."

It would seem, therefore, that this decision brings the question of the allowance of the additional award for reservoir availability and adaptability squarely within the decision of the courts of the State of New York (130 App. Div., 350-356, affirmed 195 N. Y., 573), holding that:

"It is only when it is shown that it has a market value for some particular use, that the availability and adaptability of property to the use, can be taken into consideration by the commissioners in determining its fair market value" (130 App. Div., 350).

"The question, therefore, is not whether the property is particularly adapted for the special use, but whether purchasers can be found who would pay more for it because of its adaptability to the use" (130 App. Div., 356).

To uphold the award for reservoir availability and adaptability, therefore, under these decisions there must be evidence that its value had been increased in the market by reason of such adaptability.

II.

There is absolutely no evidence that the value of Parcel 738 had been increased by reason of availability and adaptability for reservoir purposes.

If there had been a demand for this property for reservoir purposes or for any other purpose, which

had increased its value, that increase would necessarily be reflected in the value placed upon it by the real estate witnesses called by the claimant. These men who lived in the vicinity and who had known the property for years testified to its fair market value but stated that that value was "exclusive of reservoir value." Their testimony, however, shows that this reservoir value which they had excluded was not anything that had affected the price at which the property could be sold as between an owner not unwilling to sell and a purchaser desiring to buy. It was something of which they, although claiming to know the market value of the property, knew nothing and as to which they stated they were not competent to testify. It is this value which the claimant undertook to prove by the three engineer witnesses. Although labelled "market value for reservoir purposes" the testimony of these witnesses shows that the amount testified to by them is simply the proportionate share to which the 86 acres of land in this parcel would be entitled of the entire valuation placed by them on the submerged 10,000 acres in the reservoir by fantastic speculations based on so-called (1) imaginary savings accruing to The City of New York by its using the Ashokan site in preference to some other (Vermeule). (2) The amount that a corporation or individual could pay for the entire Ashokan site and make money (Horton). (3) Imaginary profits that would be derived by The City of New York if it should sell all the water impounded in the Ashokan site at a certain price after deducting the cost of construction (Nostrand).

It is clear that this testimony was not offered for the purpose of proving that the value of the Sage parcel, No. 733, had been increased in the market, but on the theory advanced by the claimant in his brief in the court below, that as the parcel was to

be used as part of the Ashokan site the owner was entitled, under the decision of this Court in the Boom case, to have it valued in connection with all the other parcels taken for the Ashokan Reservoir as a whole for reservoir purposes regardless of the fact that it had never been considered up to the time of the condemnation proceedings for that use and, consequently, its availability for that use had not affected the market value. Aside from the vices with which all of this testimony is infected, it would seem sufficient here to say that its fundamental basis is the valuation of all the parcels comprising the reservoir site with their hundreds of different titles as a whole and that it is in violation of the rule of law laid down by this court in *Boston Chambers of Commerce vs. City of Boston, supra*.

This brings us to a consideration of the only other evidence in the case, the Ramapo maps and the proceedings of the Common Council of Kingston. The Circuit Court of Appeals in its opinion says:

"Its availability for furnishing New York with pure water was appreciated fourteen years ago, when the Ramapo Company *was organized for the purpose of selling the water in question*, not only to The City of New York, but to other cities of the State, located on both banks of the Hudson. The availability of the Ashokan site induced the City of Kingston to make a careful examination of its capacity for furnishing a supply of water to that city."

In the first place, the Ramapo Company was not organized for the purpose of taking or selling water from the Esopus Creek, which is in Ulster County, New York, at all, but, as stated in paragraph 6 of its certificate of incorporation:

"The operations of the company are to be carried on mainly in the Counties of Rockland and Orange, State of New York" (fol. 1405).

In the next place, the fact that the Ramapo Company had considered the construction of several reservoirs of smaller capacity than the Ashokan reservoir in Ulster County (fol. 252) for the purpose of selling the water in question, *i. e.*, the water of the Esopus, and that the City of Kingston had considered one site at Bishop Falls, further up stream than the Ashokan Dam, and one at Winchell Falls, below the point where the Beaverkill Creek empties into the Esopus, which is nearly a mile below the Ashokan Dam (fol. 1265), cannot be said to have created a demand for parcel 733, because it would not have been included in those contemplated reservoirs. The Esopus Creek is 50 or 60 miles long. There are a number of reservoir sites at different points along the creek (fol. 680). Bishop Falls, the site approved by the Engineer of the City of Kingston for the location of its proposed reservoir (fol. 1273), and the proposed Ramapo Reservoir site were located on the Esopus Creek above the Ashokan Dam, while the Sage parcel No. 733 is located on the Beaverkill. The City of New York, as appears from the testimony and the map, is, in fact, constructing two distinct reservoirs, arranged so that either can supply the aqueduct. There is a dam enclosing the Esopus Creek and a dike enclosing the Beaverkill. Separate pipes connect these two portions of the reservoirs with the aqueduct.

The Sage farm is five miles away from the proposed Ramapo and Kingston sites and it is in a different watershed. No rain falling on the Sage farm would have flowed into the Ramapo or Kingston proposed reservoirs and merely to impound the water of the Esopus would not have required, as heretofore stated, a reservoir larger than the western portion of the reservoir, which would have excluded the Sage parcel.

Again, the Ramapo and Kingston sites are at an elevation of only 500 feet, while the elevation of the Sage farm is 587 feet besides being more than five miles away it is at a higher elevation and would have no value for reservoir purposes, either to the Ramapo Company or the City of Kingston. So that even if a demand, which was not reflected in the market price, for property to be used in connection with other property would entitle the owner to have his property valued in connection with such other property as a whole regardless of the conditions of the titles, and regardless of the fact that it could not be made adaptable except in connection with such other property and by the expenditure of immense sums of money in assembling the various elements together, nevertheless, so far as the Sage parcel is concerned, in no circumstances could such testimony bring it under the rule laid down in the Boon Company case, because it would not be needed for a reservoir which would store all the water that can be obtained from the Esopus Creek. Nor does any of the testimony which has been adduced in this case tend to show that the price at which the property could be sold in the market had been influenced by adaptability for reservoir purposes.

The Circuit Court of Appeals also says in its opinion:

"We are not at all convinced that, with the question presented upon the testimony in this record, the State Courts would have decided as they did in the cases reported in 130 App. Div., 350-356; affirmed, 195 N. Y., 573."

If the Honorable Circuit Court of Appeals had had before it the record of parcel 271-a or had even compared what the Court in its opinion, 130 App. Div., 356, had said as to the testimony of C. E. Ver-

meule, who was the leading expert and engineer for the claimant in that case, with the testimony of this same witness in the Sage case, where he was also the leading expert and engineer (fols. 564, 582), it would not have assumed that the State Courts had not passed upon the identical questions presented by the evidence at bar. In that case the Appellate Division said at page 357:

"The witness testified that the fair and reasonable market value of this parcel on the 22d day of July, 1907, when it was taken by the city, was \$99,280 and that in arriving at this estimate he considered the special adaptability of the reservoir site, of which the parcel is a part, and the special availability of it as compared with other possible sites, and secondly the reasonable value of water delivered to a city for city use and the cost of delivery.

He also testified that the Ashokan Reservoir site was worth \$34,000,000 and that this valuation was based upon the capacity of the reservoir, the reasonable market price of the water when delivered at the furthest city in which it would be likely to be used and the cost of delivery; that the storage capacity of the property in question would be 76-100 of one per cent. of the whole capacity of the reservoir; that on that basis the intrinsic value of the property taken would be \$248,000 and *the market value was 40 per cent. of that sum or \$99,280.*"

Comparing this with his testimony in the Sage case and his statement (fol. 575)

"I have taken these four valuations and averaged them, and the average of all for the Ashokan Reservoir Basin comes to \$34,193,200, which I take as the intrinsic value of that reservoir site; that, if it is spread over the entire 10,000 acres of reservoir site, would amount to

an intrinsic value of \$3,400 per acre. I have taken for *the market value* spread over the entire site 40 *per cent.* of this or \$1,360 per acre for an average depth of reservoir of 36.2 feet,"

it will be seen that the theory of this witness is exactly the same in both cases. As the basic principle of the other two engineer witnesses for claimant in the Sage case was similar to that of this witness, namely, the valuation of the entire site taken by the City for the Ashokan Reservoir as a whole, it would seem that the State Courts did pass on the identical question presented by the evidence in the case at bar.

III.

The Circuit Court of Appeals erred in holding that this was a controversy between citizens in different States removable from the State to the United States Court.

By the Constitution and laws of the United States, the jurisdiction of the federal courts on the ground of citizenship of the parties extend only to suits between citizens of different states, and in order to remove a case from a State court to the United States Court, that difference of citizenship must have existed at the time when the suit was begun as well as at the time of removal.

Section 416 of the New York Code of Civil Procedure provides:

"A civil action is commenced by the service of a summons,"

and Section 433 provides:

"The provisions of this article relating to the mode of service of a summons apply like-

wise to the service of any process or other paper whereby a special proceeding is commenced in a court or before an officer except where special provision for the service thereof is otherwise made by law."

It has been held that a condemnation case is a special proceeding within the New York Code.

King vs. New York, 36 N. Y., 182.

Matter of Peterson, 94 App. Div., 143.

Matter of Grade Crossing Commissioners, 17 App. Div., 54.

The question is what is the "process or other paper" whereby this special proceeding was commenced? Chapter 724 of the Laws of 1905 of the State of New York, under which this proceeding was brought, provides for the making and filing by The City of New York of maps upon which shall be laid out and numbered the various parcels of real estate to be taken. By section 7 it is provided:

"After the said map shall have been filed
 * * * * the corporation counsel for and
 on behalf of The City of New York shall, upon
 first giving the notice required in the next section of this act, apply to the Supreme Court
 * * * * for the appointing of commissioners of appraisal * * *."

The next section provides:

"Sec. 8. The corporation counsel shall give notice in the City Record, and in two public newspapers published in The City of New York, and in two public newspapers published in each other county in which any real estate laid out on said maps may be located, and which it is proposed to acquire in the proceeding, of his intention to make application to the said court for the appointment of commissioners of appraisal, which notice shall specify the

time and place of such application, shall briefly state the objects of the applications and shall describe the real estate sought to be taken or affected. A statement of the boundaries of the dams, reservoirs, sluices, culverts, canals, pumping works, bridges, tunnels, blow-offs, filters and ventilating shafts and of the route of the tunnels and aqueducts by courses and distances and of the greatest and least width of its track, with separate enumerations of numbers of the parcels to be taken in fee, and of the numbers of parcels in which an easement is to be acquired, with a reference to the dates and places of filing the said maps shall be sufficient description of the real estate sought to be so taken or affected. Such notice shall be so published continuously in each issue of the newspapers for six weeks immediately previous to the presentation of such petition; and the corporation counsel shall in addition to the said advertisement cause copies of the same in hand bills to be posted up for the same space of time, in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate so to be taken or affected."

Section 9 provides:

"At the time and place mentioned in said notice * * * the court upon due proof to its satisfaction of the publication and posting aforesaid and upon filing the said petition shall make an order for the appointment * * * of commissioners of appraisal * * *"

This is a proceeding *in rem* and jurisdiction of the subject matter is acquired by the posting and publishing of the notice required by the statute of the intention of The City of New York to make application for the appointment of Commissioners of

Appraisal, upon the filing of whose oaths title to the fee of the parcels on the map vests in The City of New York.

It would seem, therefore, that this posting and publishing is the process referred to in section 433 of the Code whereby this special proceeding is commenced, and as the map must be filed before this notice by posting and publication in newspapers or the process can be issued that the map is the paper referred to in section 3348 of the Code, which provides:

“Where a provision of this act is made applicable by the last section, to an action or a special proceeding commenced on or after a day herein specified, if, before that date, a summons in an action, or a citation issued from a surrogate's court, has been served upon one or more, but not upon all, of the persons to be served; or an order for the service of a summons as prescribed in article second of title first of chapter fifth of this act has been made; or, in a special proceeding, elsewhere than in a surrogate's court, the petition or *other paper*, upon which the first order, process, or other mandate may be made or issued, has not been presented, the action or special proceeding is not deemed to have been commenced within the meaning of that section.”

As Mr. Sage was not the owner of parcel 733 at the time of the commencement of the suit, the Federal Court was without jurisdiction and the case should have been remanded back to the State court.

IV.

It is earnestly urged that the question presented, being one of great importance to The City of New York, and the decision of the United States Circuit Court of Appeals being in conflict with the decision of this Court and of the State Courts, that this Court should review the decision of the Circuit Court of Appeals.

Respectfully submitted,

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Attorney for Petitioner.

WM. MCM. SPEER,
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of Counsel.

130 App. Div., 350.

Affd., 195 N. Y., 573.

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

In the Matter

of

The Application and Petition
of J. Edward Simmons,
Charles N. Chadwick and
Charles A. Shaw, constitu-
ting the Board of Water
Supply of the City of New
York, to acquire real estate.

CONDEMNATION PROCEEDINGS. AVAILABILITY OR
ADAPTABILITY. STRUCTURAL VALUE. COSTS.

The owner of land taken for a public use is entitled to the full market value of the property, which means the fair value as between a willing seller and a willing purchaser. He is not entitled to be paid more merely because the land is peculiarly adapted to the use to which it is to be applied.

It is only where it appears that the market value of the property is enhanced in the public mind by the chances or probability that some time in the future it may be required for the purpose to which it is adapted that such adaptability may be taken into account by commissioners of appraisal.

The structural value of buildings upon the property taken is not competent evidence in condemnation proceedings.

In proceedings under chapter 724 of the Laws of 1905, the property owners are not entitled to

taxable costs. An allowance for counsel fees of five per cent. on the amount of the award, held sufficient under the circumstances of this case.

Argued November Term, 1908.

Decided January Term, 1909.

Appeal from a final order of the Supreme Court, confirming a report of the commissioners of appraisal for Section 6 in the Ashokan Reservoir, filed and entered in the Clerk's office of the County of Ulster, April 17, 1908, and from the appraisal and report of the commissioners.

Before Smith, Presiding Justice; Chester, Kellogg, Cochrane, Sewell, Associate Justices.

D. Cady Herrick for appellant, John J. Linson for respondent.

Sewell, J.—This proceeding was instituted under chapter 724 of the Laws of 1905, entitled "An act to provide for an additional supply of pure and wholesome water for the City of New York; and for the acquisition of lands or interest therein and for the construction of the necessary reservoirs, dams, aqueducts, filters and other appurtenances for that purpose; and for the appointment of a commission with the power and duties necessary and proper to attain these objects."

Section 12 of the act provides for the appointment of commissioners of appraisal and that it shall be their duty to view the real estate and hear the proofs and allegations of the parties and other persons interested and that they "shall without unnecessary delay, ascertain and determine the just and equitable compensation which ought to be made by The City of New York to the owners or the persons interested in the real estate sought to be acquired or affected by said proceedings."

The proceedings were commenced June 25, 1907, to acquire certain real estate in the Town of Hurley, Ulster County, known as Parcel 246. The commissioners of appraisal were appointed June 29, 1907, and on the 6th day of November, 1907 they proceeded to hear the proofs and allegations of the parties. In their report dated January 3, 1908, they stated that they had estimated and determined upon \$3,300 as the sum to be paid to the owners for the fee of the premises.

The principal question presented by this appeal is whether the commissioners proceeded upon an erroneous principle in determining the amount that should be awarded to the owners. It is unnecessary to cite and comment upon the various cases, decided in the courts of this and other states, upon the subject of damages in proceedings of this character. It is sufficient to say that the rule is well established in this state, by an unbroken line of authority, that the owner is to receive the full value of the land taken, not its value to the owner or to the person or corporation seeking to acquire it, but the market value of the property, which means the fair value as between one who wants to purchase and one who wants to sell. The landowner is not limited in compensation to the condition which the property is in at the time, or to the use which he makes of it, but is entitled to receive its market value for any purpose to which, in the judgment of the commissioners, it is adapted. He is, however, not entitled to be paid more merely because the land is peculiarly adapted to the use to which it is intended to be applied. The fact that the land will be used for a reservoir rather than a farm or any other lawful business, forms no material out of which an award is to be made. Whether the land taken is to be used for a reservoir, or a garden, is a question, so far as the compensation is concerned,

with which the commissioners have nothing to do. Their duty is to award compensation for the taking of the land and not for the use to which it will be applied when taken. (*The Albany Northern R. R. Co.*, 16 Barb., 68; *Matter of Daly*, 72 App. Div., 394; *Matter of East River Gas Co.*, 119 App. Div., 350).

It is only when it is shown that it has a market value for some particular use, that the availability and adaptability of the property to the use, can be taken into account by the commissioners in determining its fair market value.

The owner is not entitled to swell the damages beyond the fair market value of the land at the time it is taken, by any consideration of the chances or probability that sometime in the future, it may be used for some purpose to which it is adapted, unless it appears that the market value of the property is enhanced by the chances or probability. As stated in *Moulton vs. Newburyport Water Co.* (137 Mass., 163): "If there were different customers who were ready to give more for the land on account of the chances, or if there were any other circumstances affecting the price which it would bring upon a fair sale in the market, these elements would necessarily be considered by the jury, or by a witness in forming an opinion of the market value." But the mere hopes of an owner that his property may at some future time be required for a reservoir or storage basin for supplying The City of New York or any other city with water, cannot be considered; unless the probability of such an event, in the public mind, had in fact affected the fair market value at the time it was taken. (*Matter of N. Y., L. & W. R. R. Co. vs. Arnot*, 27 Hun, 151). This rule was stated by Mr. Justice Cullen in the *Matters of Daly vs. Smith* (18 App. Div., 197), where he said: "It is the market value of the property

that is the measure of the compensation. When, therefore, it is sought to show that a tract of land has a use for a particular purpose, it must be also shown that it is marketable for that purpose, or has an intrinsic value."

It is contended on behalf of the appellant that an improper basis was adopted by the commissioners in determining the compensation which ought justly to have been made him. (1) In excluding from consideration as an element in the market value of the property, the structural value of the buildings upon it. (2) in excluding evidence of the adaptability and availability of the property for reservoir purposes. (3) In excluding evidence of the value of the property as a part of a reservoir site. It is argued that the award is much less than it would have been had this evidence been admitted and considered. It is unnecessary to discuss the question whether the commissioners erred in refusing to permit the owner to show the value of the structures upon the land, further than to say, that it is the market value of the land with the buildings and other improvements thereon, that it is the measure of compensation. The buildings put upon the land are simply adjuncts to the freehold. They add to its value and are properly included in an appraisal of it but it is the value of the land and structures which is to be determined, and not the cost of them. For these reasons it has been held that testimony of the structural value of buildings is not competent in proceedings of this kind. (*Matter of The City of New York*, 118 App. Div., 272; *Village of St. Johnsville vs. Smith*, 184 N. Y., 34).

It is probably true that the commissioners might properly have received evidence tending to show that the Ashokan reservoir site is the cheapest, best and most available site for water supply purposes and for furnishing water to The City of New York,

but it was not error to exclude the testimony offered as those facts were stated in the petition, and no issue was raised over the question of a demand on the part of The City of New York or the availability or adaptability of the property. When the material allegations in a verified petition in a special proceeding are not denied by some counter affidavit they stand sufficiently proved for the purpose of the ultimate order. (26 St. R., 968; 99 N. Y., 12.)

The proceeding was based upon a demand for the property on the part of The City of New York and its adaptability and availability in conjunction with other parcels for a reservoir site. The record shows that the commissioners understood that these facts were established, and that they went no farther than to hold that the facts could not be considered, in forming an opinion of the market value of the property, in the absence of any evidence showing that they had enhanced or affected its value, before it was appropriated by the City.

It was for the commissioners to determine whether the land was really saleable and marketable as a part of a reservoir site, and if they so found, the real price or sum that could be obtained for it. The appellant did not prove or attempt to prove that the value of the property in question or any of the property included in the reservoir site, had been increased by its adaptability or availability for reservoir purposes before the commencement of this proceeding. There is no shadow of evidence of any prior demand for the property as a reservoir site or of any customer who will give more for it for that purpose, or of any circumstance by which the value of the parcel in question, as a part of a natural reservoir site, could be estimated or determined. In the absence of such evidence it is plain that the appellant has received the benefit

of everything which enhanced the value of his property, except the increase caused by the taking of it by the City. The offer was in effect, to prove an increase in value due to the selection of the site by the City and the proceeding to acquire it. It did not merely bring up the question of the value of the property taken from the appellant, but that value plus an increase in value caused by the proceeding to condemn. As I have already observed, the question was the market value of the property unaffected by the determination to use it for a reservoir site, and to this question the commissioners rightly confined the evidence.

As to the authority of the Court to allow costs under section 3240 of the Code of Civil Procedure, I agree with the opinion of Mr. Justice Mills in *Matter of the Board of Water Supply of the City of New York*, which was another proceeding under this statute, that a claimant is not entitled to costs at the rate allowed for similar services in an action. Section 13 of the statute in question provided for an allowance to parties appearing in the proceeding, of such sums as the commissioners may deem proper to be allowed, "as expenses and disbursements, including reasonable compensation for witnesses." My opinion is that the Legislature intended by this provision to regulate the question of costs in proceeding under the statute. Laws are presumed to be formed with deliberation and with full knowledge of all existing ones on the same subject (*Brown vs. Lease*, 5 Hill, 221). So it is but reasonable to conclude that the Legislature in passing this statute did not intend that the right to costs under it should be governed by the general statute as to costs in special proceedings. This case is to be distinguished from, *Matter of the Application of the City of New York to Acquire certain Real Estate in the Town of Hempstead* (125

App. Div., 219), relied upon by the appellant. Chapter 725 of the Laws of 1905, under which that proceeding was brought contains no provision for the allowance of costs, expenses or disbursements to the claimant. "It does not," said Mr. Justice Woodward in that case, "assume to be an act to govern the proceedings in condemnation in whole, * * * it relates to the matter of proceedings under other statutes, whether general or special, and being a statute in *pari materia*, is to be read and construed in connection with these other statutes, rather than superseding them."

Chapter 724 is a special statute. It pretends to cover the whole question of condemnation proceedings by the City of New York to acquire lands for the purpose of a reservoir. It prescribes an independent procedure and was evidently intended to furnish the whole law on the particular subject. I am also of the opinion that the compensation awarded is adequate in view of the evidence taken. If these views are correct they lead to an affirmance of the order appealed from, with costs.

APPENDIX.

130 App. Div., 356.

Aff'd 195 N. Y., 573.

SUPREME COURT,**APPELLATE DIVISION—THIRD DEPARTMENT.**

In the Matter
of

The Application and Petition
of J. Edward Simmons,
Charles N. Chadwick and
Charles A. Shaw, constitut-
ing the Board of Water Sup-
ply of The City of New York,
to acquire real estate for and
on behalf of The City of New
York.

**CONDEMNATION PROCEEDINGS. EVIDENCE OF AVAIL-
ABILITY OR ADAPTABILITY.**

An estimate of the value of premises taken by condemnation proceedings for use as part of a reservoir based on its value in conjunction with the other parcels in the reservoir site, the value of the reservoir, the feasibility and cost of conveying the water to New York and the value of the water to the City is in the highest degree uncertain and speculative; and it is not error for Commissioners of Appraisal to strike out such testimony.

The question is not whether the property is peculiarly adapted to a special use but whether purchasers can be found who would pay more because of its adaptability.

It is only where it is shown that the chances or probability of a sale for some special use has affected the price which the property would bring in the market that its availability or adaptability can be considered in determining the market value.

Argued November Term, 1908.

Decided January Term, 1909.

Appeal from a final order of the Supreme Court confirming a report of the Commissioners of Appraisal as to Parcel 271-A in Section 7 of the Ashokan Reservoir, filed in the Clerk's Office of the County of Ulster, February 15, 1908.

Before Smith, Presiding Justice. Chester, Kellogg, Cochrane, Sewell, Associate Justices.

D. Cady Herrick for appellant.

John J. Linson for respondent.

Sewell, J.—The Commissioners awarded \$3,800 as the compensation which ought justly to be made by The City of New York to the appellant. The real estate for which the award was made consists of 60.6 acres and is one of several hundred parcels taken by the City for the reservoir. The chief question presented by this appeal is whether the Commissioners erred in striking out the evidence of Cornelius C. Vermeule, a Civil Engineer, as to the value of the property in question, the intrinsic value of the reservoir and the value of the water to be empounded by it. The witness testified that the fair and reasonable market value of this parcel on the 22d day of July, 1907, when it was taken by the City, was \$99,280, and that in arriving at this estimate he considered the special adaptability of the reservoir site, of which the parcel is a part, and the special availability of it as compared with

other possible sites, and secondly the reasonable value of water delivered to a city for city use and the cost of delivery.

He also testified that the Ashokan Reservoir site was worth \$34,000,000.00 and that this valuation was based upon the capacity of the reservoir, the reasonable market price of the water when delivered at the furthest city in which it would be likely to be used and the cost of delivery; that the storage capacity of the property in question would be 76-100 of one per cent. of the whole capacity of the reservoir; that on that basis the intrinsic value of the property taken would be \$248,000 and the market value was 40 per cent. of that sum or \$99,280.00.

It therefore appears that the opinion of the witness as to the value of the premises in question, was based upon its value in conjunction with the other parcels included in the reservoir site, upon the value of the reservoir, the feasibility and cost of conveying the water in pipes or an aqueduct to The City of New York, and the value of the water to the City.

It is to be noted that this evidence did not tend to prove the present market value of the property or its value at the time it was taken, but its probable value after other property is acquired, and millions of dollars are expended in the construction of a reservoir, which may and may not be built. It was simply his opinion of the value based upon the necessity of the land to the City or what the City could afford to pay rather than do without it.

It is too clear for argument that such an estimate of value is in the highest degree uncertain and speculative. It is sustained by no authority, cited by the learned counsel for the appellant,

and I think none can be found. On the contrary it was held in *Matter of Black River M. R. R. Co. vs. Barnard* (9 Hun, 104), when the land sought to be taken was peculiarly adapted for railroad purposes that, "It is the detriment to the owner for which he is to be compensated. When that has been ascertained, he is not to be paid more, because the land is peculiarly adapted to the use of the railroad." To the same effect was the decision in *Matter of Boston H. F. & W. R. R. Co.* (22 Hun, 176) made by the General Term of this Department nearly thirty years ago where Learned P. J., said, "The situation of hills and streams often determines, as a matter of necessity, where a public road must be built. If it must go through some narrow pass, where the land is owned by one person, he must be made to give up his land for the public benefit. All that he can have is compensation. Now, if the railroad company are to pay what the price of land is worth "for railroad purposes," and if the road must be built through that pass, then they must pay any sum which the prospects of a successful railroad will warrant. For the land would be worth "for railroad purposes" any sum, however large, which would not actually prevent the building of the road. Such a rule would do away with nearly all the benefit of the compulsory power of eminent domain. It would be giving more than compensation."

The just compensation which is guaranteed to the owner whose property is taken for public use, is its fair market value at the time taken (*Matter of Daly*, 72 App. Div., 394; *Matter East Riv. Gas Co.*, 119 App. Div., 350; *Village of St. Johnsville v. Smith*, 184 N. Y., 341; *Moulton v. Newburyport Water Co.*, 137 Mass., 163). It is true that he is not limited in compensation to the use which he makes of his property, but is entitled to a fair mar-

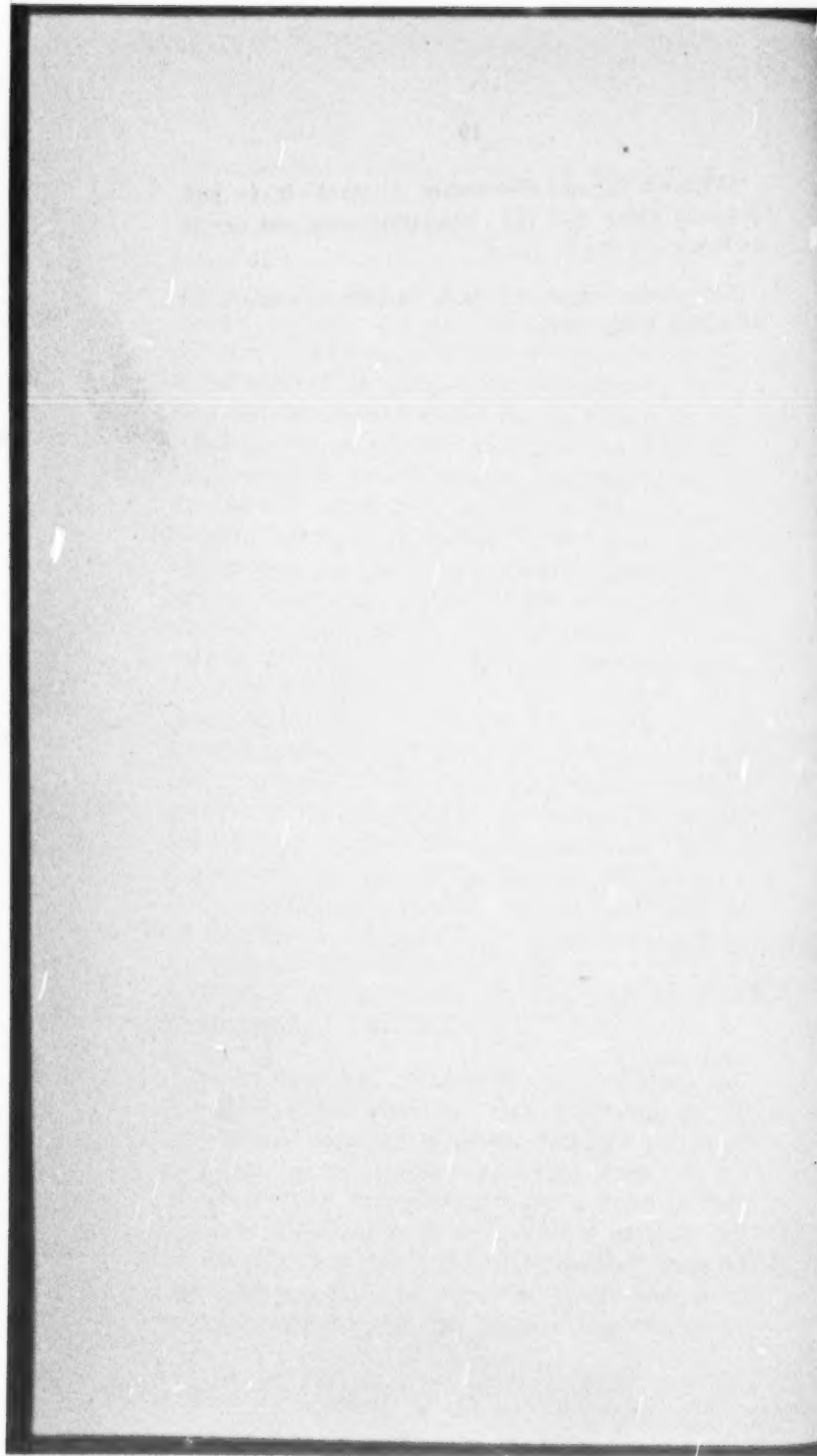
ket value, for any use to which it is adapted by virtue of its location and for which it is available.

In determining the question of value it is proper to show the condition of the property and its surroundings the uses to which it has been applied, and its capacities for other uses, including that for which it is required, and then the witness can give an estimate of its value, in consideration of all the uses and elements of value; but he cannot give an opinion of its value for any special use. The value of property is not limited by the present use or the use for which it is sought, as either may be more or less, than its market value. For example land may be valuable, abstractedly considered, for reservoir purposes, but its market value would depend upon a demand for such a purpose. If no one desired the property for a reservoir its value might be much less than for any other purpose. The question, therefore, is not whether the property is peculiarly adapted for the special use, but whether purchasers can be found who would pay more for it because of its adaptability to the use. It is only when it is shown that the chances or probability of a sale for some special use has effected the price which the property would bring in market that its availability or adaptability can be considered in determining the market value (*Matter of N. Y., L. & W. R. R. Co. vs. Arnot*, 27 Hun, 151; *Duly vs. Smith*, 18 App. Div., 197).

No evidence was given in the present case tending to show that before the land was taken by the City it was regarded as more valuable because of its advantage of location and adaptability for use as a reservoir. It is substantially undisputed that the value "for reservoir purposes" is entirely due to the fact that the City has determined to build the reservoirs, and that the owner is now seeking to make the necessity of the City his opportunity.

Without further discussion I think it is sufficiently clear that the Commission did not err in striking out the evidence.

The order appealed from should therefore be affirmed, with costs.



FILED

MAR 17 1915

JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1914.

34

THE CITY OF NEW YORK,

Petitioner,

vs.

WILLIAM SAGE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

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Attorney for Defendant in Error,

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Borough of Manhattan,

New York City.

EDWARD A. ALEXANDER,

Of Counsel.



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Supreme Court of the United States,

OCTOBER TERM, 1914. No. 307.

IN THE MATTER

OF

THE PETITION OF THE CITY OF NEW YORK for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit in the case therein entitled:

IN THE MATTER

OF

The Application and Petition of JOHN A. BENSEL, CHARLES N. CHADWICK and CHARLES A. SHAW, constituting the Board of Water Supply of The City of New York, to acquire real estate for and on behalf of The City of New York, under chapter 724 of the Laws of 1905, and the acts amendatory thereof, in the Town of Hurley, Ulster County, New York, for the purpose of providing an additional supply of pure and wholesome water for the use of The City of New York.

THE CITY OF NEW YORK,
Plaintiff in Error,

VS.

WILLIAM SAGE, JR.,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This case is before this Court on a writ of *certiorari*, to review the proceedings of the United

States Circuit Court of Appeals, Second Circuit, which resulted in the entry of a final order, affirming an order of the United States Circuit Court (now District Court) for the Southern District of New York, confirming a report made by three commissioners of appraisal, appointed by the State Supreme Court, Ulster County, New York, which awarded to the defendant in error the sum of (p. 489, fols. 1466-1467) \$11,948.90, as the fair and reasonable market value of eighty-six and a fraction acres of improved real estate, taken by the City of New York, under eminent domain. The commissioners of appraisal (p. 471) in their report (p. 475, fol. 1424) awarded the sum of \$7,624.45 for land and buildings, and the further sum of \$4,324.45 for reservoir availability and adaptability, and in full settlement for all claims of damage sustained, or which may be sustained, by reason of the acquisition, use or occupation of the land in question.

The reservoir which the City of New York has condemned is a natural reservoir, composed of about 15,000 acres. For the purpose of condemning it, the engineers of the City prepared a large number of sectional maps, dividing the territory embraced within the reservoir into a large number of separate and distinct parcels of land. These parcels of land, created by this artificial division on the maps, did not, of course, exist in this great reservoir site. The reservoir site was composed chiefly of farms. Some of these farms were from 50 to 200 acres in extent. The number of parcels indicated on the sectional maps prepared by the City furnishes absolutely no evidence of the actual number of parcels into which the reservoir basin was naturally divided, when the City of New York commenced to condemn it for its own purposes.

A reference to the Burr-Herring Freeman report would show, that one of the reasons urged by the three great engineers who made up that report, for acquiring this particular site was that the site was so sparsely populated. There were only 2,000 inhabitants living in this entire region of approximately twenty-eight square miles, or about seventy human beings to a whole square mile. Most of these lived in the little country villages.

The commissioners of appraisal, in the case at bar, followed both the decisions of the courts of New York State, in 130 App. Div. 350, 356; affirmed 195 N. Y. 573, and the decisions of this Court in the Boom Company and later cases, and there was ample evidence before these commissioners of appraisal, warranting them in finding, that the market value of the land in question had not only been affected, but enhanced, by reason of the fact that the property in question was a part of the Ashokan Reservoir Site, which the City has condemned, and that prior demands for this site existed in the open market, thereby causing a slight increase in the market value of the property in question.

The United States Circuit Court of Appeals held that if the same evidence, as was introduced in this case, had been before the courts of the State of New York, they believed the courts of New York would have held just the same as they did.

The United States Circuit Court of Appeals delayed handing down their opinion in this case, until the decision of this Court in *McGovern vs. The City of New York*, 229 U. S. 363, and upon reading the opinion of this Court in the McGovern case, and seeing that this Court passed only on the question of jurisdiction in that case, the United States Circuit

Court of Appeals followed the well-settled rules of law laid down by this Court.

The defendant in error in this case has received for his eighty-six acres of improved real estate only \$11,948.90, or about \$138.00 per acre. The City officials and their engineers had made an estimate of the probable cost to be paid for the 15,000 acres contained in the Ashokan Reservoir Site, including the relocation of railroads and riparian damages, at \$520.00 per acre (p. 74, fols. 222-223).

In making their award, the commissioners of appraisal did not make it on the basis of the value of the reservoir to the City of New York.

As Judge Lacombe said in his opinion, confirming their report,

"The evidence shows that the land in question, together with that of claimant's neighbors, was available as a reservoir site, and that such availability was not confined to the uses of New York City. Apparently, the award is not made on the basis of the value of the reservoir lands to the City of New York alone; had such been the basis, the valuation would have been very much higher, but the commissioners have taken into consideration, as an element of value, the circumstance that, had New York City never gone to this water shed, some other political community, or some water company created by statute, might have been willing to pay more for their value, as farming land for the parcels which would enable it to impound water there. Under *Boom Co. v. Patterson*, 98 U. S. 403, this was a proper method of determining value."

In the *Matter of Simmons*, 130 App. Div. 350-356, counsel for The City claimed that the case of

Boom Co. v. Patterson, decided by this Court, was not (to use their own language),

“in line with the best authority.”

(See brief of John J. Linson and Howard Chipp, Esq., in the App. Div., Supreme Court, Third Judicial Department, pp. 36-37.)

The New York Court of Appeals, in affirming 130 App. Div. 350-356, wrote no opinion.

Since the affirmance in that case the New York Court of Appeals, in 198 N. Y. 84, reversed itself on the question of structural value, which it had affirmed in that case, and it will be seen, from an inspection of the entire litigation, that the New York Court of Appeals has never squarely passed upon the subject of reservoir availability and adaptability, in any written opinion, and that it decided to affirm the *Simmons* case (130 App. Div. 350, 356), practically on the same ground that this Court refused to take jurisdiction of the same case, i. e., to quote the Court's own language, *Matter of City of New York*, 198 N. Y. 84, 91, 92:

“It is the well established rule that courts of review will not disturb the determination of commissioners in condemnation proceedings for mere errors in the admission or exclusion of evidence unless the commissioners have proceeded upon a wrong theory to the prejudice of one of the parties. The commissioners view the premises, and in coming to a conclusion as to value they may take into consideration the knowledge thus acquired in connection with the oral evidence produced before them. That the courts in the *Simmons* case acted upon this rule is shown by the fact that, although there were diametrically contrary rulings upon the same

kind of evidence, they did not consider the matter of sufficient importance to reverse either of the determinations there involved."

Statement.

The State Statute, under which the City of New York has condemned this reservoir site (Chapter 724, laws of 1905) provides that the City must give notice of its intention to file its petition with the Special Term of the State Supreme Court, where the lands which it intends to acquire are located, and that upon its filing its petition, the said Supreme Court, if the allegations of the petition warrant it, must appoint three disinterested freeholders as commissioners of appraisal, and that upon these commissioners of appraisal filing their written oaths of office in certain specified county clerk's offices, the fee simple of the property designated on certain sectional maps, and, particularly described in the petition, shall vest in the City in all cases where it desires to acquire the fee.

Section 8 of the State Statute provides:

"§ 8. The corporation counsel shall give notice in the *City Record*, and in two published newspapers published in the City of New York, and in two published newspapers published in each other county in which any real estate, laid out on such maps, may be located, and which it is proposed to acquire in the proceeding, of his intention to make application to the State Court for the appointment of commissioners of appraisal, which notice shall specify the time and place of such application, shall briefly state the object of the application, and shall describe the real estate sought to be taken or affected."

Prior to the time when the City filed its petition, the defendant in error, a resident and citizen of New Jersey, was the owner in fee of the land taken by the City, and he remained continuously the legal and beneficial owner of this land, up to and until the time that the City divested him of his title, by virtue of its having complied with the provisions of the above-mentioned statute.

The City of New York, on its motion to remand, was beaten on the merits, before Judge Noyes and Judge Lacombe, and on appeal in the United States Circuit Court of Appeals.

Judge Noyes expressly decided, as stated by him in his opinion (pp. 32-33, fols. 96-97) :

"The claimant was the owner of the land in question, at the time of the commencement of the proceedings, and as a citizen of another state, had the right to remove them to this court. There is nothing in the record, from which fraud or collusion on his part can be found."

After the final order in this case was affirmed by the United States Circuit Court of Appeals, the City of New York made and entered into a written stipulation with the defendant in error, and it is expressly provided (pp. 543-544) that the defendant in error shall have the right

"to submit to the United States Supreme Court a written stipulation, heretofore made between the plaintiff in error and the defendant in error, in regard to the award."

This stipulation provided that the City should pay to the defendant in error, the full amount of the award, upon the latter giving a surety company bond, to secure to the City, the repayment of the sum of \$4,324.45, and certain other amounts, with

interest, in case the item allowed for reservoir availability and adaptability should be reversed, set aside and disallowed, by either the United States Circuit Court of Appeals, or this court, upon condition that the defendant in error would not urge the payment of the award by the City, as a ground to object to the hearing of this appeal before this court, but the defendant in error reserved his rights to object on any and all other grounds.

Under this stipulation, counsel for the City had no right to raise the question of remand in this court, but, in view of the fact that they have raised this point, it will be necessary for counsel for defendant in error to discuss it.

A number of facts, stated by counsel for the petitioner, on pages 5 and 6 of their brief, under the title "STATEMENT," are unnecessary, except upon the theory of their urging the point of remand, in violation of their stipulation, thereby making it necessary for counsel for defendant in error to fully discuss this point.

From pages 6 to 14, inclusive, of their brief counsel for the petitioner have carefully selected isolated fragments of the testimony of various witnesses, which, if read alone, disconnected from all other parts of the testimony of the same witnesses, and of the other evidence in the case, convey an erroneous impression.

At the hearing before the commissioners of appraisal, reliable witnesses, familiar only with the agricultural value of the property, testified that for such purposes solely, exclusive of a valuable quarry upon it, it was fairly and reasonably worth, in the open market, \$12,000., being more than the total

award for all purposes, made by the commissioners of appraisal.

Testimony of Sacks (pp. 98-99, fols. 292-297, John B. VanKleeck, p. 108, fols. 322-323).

A practical quarry man testified that the quarry upon the property was worth \$1,500.00, making the total value of the property, for farming purposes only, \$13,500.00 (pp. 116-117, fols. 348-350). The fair and reasonable market value of the timber on this property was \$5,037.80 (p. 136, fol. 408).

Counsel for the City did not introduce in evidence, before the commissioners of appraisal, or attempt to introduce, a map or blueprint annexed to the record on appeal and marked "Map of Ashokan Reservoir." They made this map a part of their petition for a rehearing before the United States Circuit Court of Appeals.

Counsel for defendant in error questions the correctness of this map, as he has had no opportunity to test its correctness, and it was no part of the record, either before the commissioners of appraisal, before the United States District Court or before the United States Circuit Court of Appeals. There is no evidence showing how the map was made up or that it correctly represents what it purports to represent.

Counsel for the City moved to confirm the report of the commissioners of appraisal, as to the land and buildings only, and to modify their report, by striking out the item of \$4,324.45 allowed for reservoir availability and adaptability.

Under the practice and procedure in New York State the Court at Special Term had no power to modify the report of the commissioners of appraisal,

as the Constitution of the State of New York expressly provides that an award in eminent domain must be made by three disinterested freeholders, and the courts of New York have decided that the only power of a Court is either to confirm or set aside a report.

The various objections urged by counsel for the petitioner, against the affirmance of the lower courts, will be considered under separate points in this brief.

Before taking up, however, the chief point involved in the case it will be necessary to consider the technical point raised by petitioner's counsel on the question of remand.

P O I N T S.

POINT I.

It was not error to refuse to remand this proceeding to the State court.

Under the stipulation made and entered into between the parties, which has already been referred to, pursuant to which the City has already paid the defendant-in-error the full amount of the award, the only right which the City has is to recover the item allowed for reservoir availability if this Court reverses the lower courts.

Aside, however, from the stipulation, it is perfectly clear that no proceeding was commenced by the City until its petition for the appointment of commissioners of appraisal was filed in the State court.

On this question, Judge Noyes, after a full hearing, held :

"The proceedings here cannot be said to have been commenced so as to create a controversy between the owner of the land, and the Municipal corporation, until the petition for the appointment of the commissioners of appraisal was filed in the State Court. The prior filing of maps, and publication of notices, indicated only an intention to commence proceedings, which might not have been carried out."

The United States Circuit Court of Appeals say in their opinion (pp. 519-520) :

"We are convinced that the proceeding was not commenced until the petition had been actually filed in the state courts and this was done after the deed to Sage had been executed and recorded. As pointed out by Judge Noyes, the filing of maps and the publishing of notices did not commence any legal proceedings, but at best indicated an intention so to do. That intention might be abandoned or modified and no actual proceeding to acquire the land in question was commenced until the petition was filed.

The only reason urged for remanding the case in the brief of the plaintiff in error is that the land in question was transferred to a non-resident for the purpose of creating jurisdiction in the Federal Courts. Neither fraud nor collusion is charged, but it is asserted that after the State Court had obtained jurisdiction the controversy was removed for the sole purpose of securing a tribunal where a more liberal rule of damages obtains than in the New York courts. This contention cannot be sustained for the reason, already pointed out, that the land was purchased by the defendant in error be-

fore the condemnation proceedings were begun in the State Court.

We cannot indulge in conjecture or guesswork. For aught that appears in the record the sale to William Sage, Jr., was a perfectly fair, honest and legitimate one."

The language of Section 8, of Chapter 724 of the Laws of 1905, previously quoted herein, clearly indicates that the City acquires no legal title to land, by merely filing maps, and that it only commences the proceeding when its petition for the acquisition of land has been filed in court.

The language of Section 8, above referred to, is that the City shall give notice of its intention to apply to the Court, and in such notice

"shall briefly state the object of the applications, and shall describe the real estate sought to be taken or affected."

Even in the absence of the express language of the statute in question, Judge Noyes' ruling, sustained by Judge Lacombe and by the learned Circuit Court of Appeals, is undoubtedly the well-established law.

In *Cyc. of Law and Procedure*, Vol. 1, page 751, under the title "Actions," it is said:

"e. Special Proceedings.—(1) In General. In New York the presentation of a petition is deemed the commencement of a special proceeding."

Matter of Bradley, 70 Hun, 104; 23 N. Y. Supp., 1127.

Section 3348 of the Code of Civil Procedure expressly provides as follows:

"Section 3348 *Id.*: What Deemed Commencement of Action, etc. Where a provi-

sion of this act is made applicable by the last section to an action or a special proceeding commenced on or after a day therein specified, if before that date a summons in an action or a citation issued from a surrogate's court has been served upon one or more, but not upon all of the persons to be served; or an order for the service of a summons as prescribed in Article Second of Title First of Chapter Fifth of this act has been made; or in a special proceeding elsewhere than in a surrogate's court, the petition or other paper upon which the first order, process or other mandate may be made or issued, has not been presented, the action or special proceeding is not deemed to have been commenced within the meaning of that section."

In *Lewis on Eminent Domain*, Vol. 11, page 929, it is said:

"A condemnation case is a special proceeding and not an action within the New York Code."

See, also:

King v. New York, 36 N. Y. 182.

Matter of Peterson, 94 App. Div. 143.

Matter of Rochester, 102 App. Div. 99.

Lewis further states (Vol. II, p. 969):

"If the statute requires a petition, it is indispensable to jurisdiction."

The statute in the case at bar required the City of New York to file its petition with the State Supreme Court where the land is located.

The mere fact that the City filed some maps and

advertised that it intended to commence the proceedings did not give any court jurisdiction, and, under all the authorities, does not constitute the commencement of any special proceeding.

Furthermore, if this were not so, if the proceeding had been commenced, the defendant-in-error would still have had the right to have removed his claim to this court, inasmuch as he became the *bona fide* owner of the property before the City took title, and inasmuch as he had not appeared in the state court except for the purpose of having his claim removed. It is too well known to this court to require the citation of authority that a party may remove his case from a state court to a federal court on the ground of diversity of citizenship before he answers in the state court. The mere fact that an action has been commenced against him will not preclude him from moving his case into a federal court.

Even if this were not true, it has been held that acquiescence in the order of removal waives the question of jurisdiction.

In the case at bar, not only did the City of New York not appeal in the state court from the order granting the removal; not only did it proceed affirmatively without objection to submit its case on the merits before the Commissioners of Appraisal, but it, also, moved for affirmative relief before Judge Lacombe and only when it was beaten did it again raise the question of remand. The actions of the City constitute a complete waiver of this question.

See:

Merchants Heat & Light Co. vs. Clow, 204 U. S. 286, 289.

Encyc. of Pleading and Practice, Vol. 18, pp. 391, 393, 395; particularly p. 393, citing:
New Orleans City R. Co. v. Crescent City R. Co., 33 La. Ann. 1273.
New Orleans v. Seixas, 35 La. Ann. 37.

In *Black (Dillon) on Removal of Causes*, p. 361, chap. 18, Sec. 220, it is said:

"But, if a motion to remand for want of jurisdiction has been made and overruled, such motion cannot be subsequently renewed; it will be considered as settled."

The making and filing of a description map of a proposed reservoir is not a taking, unless expressly made so by statute.

See

15 Cyc. 658-659.

New York Central & Hudson River R. R. Co. v. The State, 37 App. Div. p. 57.

In *Lewis on Eminent Domain*, Third Ed., Vol. 2, it is said, at Sec. 566, p. 1007, *et seq.*, as follows:

"In some of the cases cited in the first section, it is said that the proceeding to condemn property for public use is a proceeding *in rem*, and that, consequently, notice to the owner is not necessary. This, however, is a mistake. Proceedings *in rem*, to be valid, require not only a seizure by the court, or its officers, but, also, notice in some form to all persons interested therein."

See, also, numerous cases there cited.

Chapter 724 of the Laws of 1905 of the State of

New York does not provide for the seizure of the property, but in place of such seizure provides for the divestiture of title by the filing of oaths of three commissioners of appraisal.

Moreover, not only did the City proceed to try its case on the merits in the Federal Court, after Judge Noyes had denied its motion to remand, not only did it appear before the commissioners of appraisal, and permit the claimant to offer his evidence, without objection, not only did it offer its own evidence, without objection, not only did it permit the commissioners of appraisal, after many hearings, on the merits, which consumed many days, extending over months, to make a report, not only did it not file any written objections to this report, not only did it move to modify this report, to confirm a part of it, and to reject another part, but in its brief before the United States Circuit Court of Appeals, its counsel stated, as follows (p. 13 of counsel's brief) :

"But the cost of these condemnation proceedings is so high that the City would pay this excessive award, rather than undergo the delay and expense of a new trial."

It is useless, therefore, to spend further time on this point. It must be clear to this Court that counsel for the petitioner have inserted this question of remand in their brief for the purpose of bringing to the attention of the Court the fact that the defendant in error purchased this land a very short while before the City commenced this proceeding to condemn it, and for the purpose of showing that the property passed through the hands of several other persons before the defendant in error acquired it.

This defendant in error who, for many years, has

resided in Orange, New Jersey, with his wife and family, was a *bona fide* purchaser of this land, was so found to be by all of the lower courts, after a most careful investigation, and it will appear, from an examination of the affidavits made by him (pp. 513-515), not only that he purchased this property in good faith, and is both the legal and beneficial owner thereof, but that he was at all times a citizen and resident of New Jersey.

This is not the case, therefore, where the mere legal title of land is transferred from one person to another, for the purpose of enabling the federal courts to acquire jurisdiction, and any intimation to that effect is not only improper but directly contrary to the adjudications of all of the lower courts and of the whole record.

Under Point IV of their brief, filed in this court, they ask this Court to reverse the final order of the United States Circuit Court of Appeals, and to send this entire case back to the State Court for a retrial, notwithstanding they have paid the defendant in error the entire amount of the award, notwithstanding their stipulation, and notwithstanding their statement about the high cost of these condemnation proceedings.

POINT II.

The Court at Special Term had no power to modify an award made by commissioners of appraisal without nullifying the Constitution of New York State.

The City not only did not object to the testimony of a single witness who appeared before the

commissioners of appraisal, the City not only did not file any written objections to the report of the commissioners of appraisal, but it moved to modify the award made by these commissioners by confirming the same as to the land and buildings and by disallowing the same as to the item of reservoir availability. The rule in condemnation cases is different from that in jury cases. The trial Court has full power over the verdict of a jury, and may reduce the damages, if excessive. Such is not the case, however, in proceedings under eminent domain.

In *Matter of Town of Guilford*, 85 App. Div. 207, at page 209, the Court says:

"The Special Term could not modify the award of the commissioners. Section 3371 of the Code provides that in condemnation proceedings, the Court may affirm the report, or may set it aside for irregularity, or upon the ground that the award is excessive or insufficient; but nowhere is it given the power to modify it. The law requires that the award shall be made, not by the court, but by a commission of three disinterested freeholders appointed by the court. If the court deemed the award excessive, it should have set it aside. (*Matter of Central New York Tel. Co.*, 36 App. Div. 553.)"

See, also,

Lewis on Eminent Domain, 3rd Ed.,
Vol. 2, Sec. 781, and numerous
cases cited in footnotes;

Old Colony R. R., Petitioner, 163
Mass. 356;

Rochester Water Works Co. v. Wood,
60 Barb. 137-139.

Section 7, of Article 1, of the Constitution of New York State, expressly provides:

"When private property shall be taken for any public use, compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by the Supreme Court, with or without a jury, but not with a referee, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law."

In *Matter of Malone*, 38 St. Rep. 95, it was held that a statute, providing that the Court might, on appeal from an award of commissioners of appraisal, increase or diminish the amount of compensation to land owners, was unconstitutional, under the foregoing section.

Applying this rule to the facts in the case at bar, it will appear that if the report of the commissioners of appraisal had been set aside in this case, and new commissioners of appraisal had been appointed, the new commissioners of appraisal might have awarded to the defendant in error \$13,500.00, or even more than that sum, as the fair and reasonable market value of his property, regardless of any enhancement in its market value, due to the fact that it is part of a natural reservoir site, the evidence showing it to be worth that much for farm and quarry purposes, but if the Court were to strike out one element of value in the property, and were to confirm the award with respect to some other element of value, the defendant in error would not have received an amount which was awarded to him by commissioners of appraisal, but would have received an amount awarded him by the Court, in place of the commissioners of appraisal.

Furthermore, in the case at bar, counsel for the City not only did not object to any of the questions asked of any of the witnesses, but filed no written objections to the report of the commissioners of appraisal.

The record will be searched in vain for any such objections.

It has been held in New York State that in reviewing the report of commissioners of appraisal, the Court at Special Term sits as an appellate tribunal, and cannot regard objections which were not made or urged before the commissioners of appraisal.

Matter of Washington Park, 1 Sanford, 283-291;

Matter of Clear Lake Water Co., 48 Cal. 586.

The timeliness and due form of objections and exceptions must be properly shown by the record.

Grubbs v. Morris, 103 Ind. 166.

Both Judge Lacombe, and the United States Circuit Court of Appeals, held (in the language of the latter learned Court, p. 521, fol. 1563) :

“The award was made by commissioners appointed by the State Court, prior to the removal, and had the amount of \$11,948.90 been awarded for the value of the land, buildings and quarry, it would not, in view of the testimony, have been exorbitant.”

In view of this fact, and of the express mandate of the Constitution of the State of New York, it would seem that the City's motion to modify this award should have been denied by the Court, for lack of power to have entertained such a motion.

The case is not altered, because the commissioners of appraisal made their award in the form of special findings. If the Constitution of the State could be frittered away in this manner, it would only be necessary for all commissioners of appraisal to make special findings, and for the courts to hold that they had the power to modify these awards, in cases where special findings were made, but not in cases where a general finding was made.

Suppose, in the case at bar, the commissioners of appraisal had awarded the lump sum of \$11,948.90, as the fair and reasonable market value of the claimant's property, could it be held that the Court at Special Term would have had no power to have modified the award, but because the commissioners made special findings, the Court at Special Term had the power? If such were the case, it would be only necessary for the Court who appointed commissioners of appraisal, to direct them to make special findings in all cases, for the purpose of evading the state constitution.

Assuming, however, that the Court at Special Term had the power to modify this award, it was fully justified in not exercising this power, by reason of the fact that the commissioners of appraisal had before them undisputed and overwhelming evidence, showing that the market value of this property was enhanced, by reason of the fact that it is a part of a natural reservoir site, that there were different customers who were ready to give more for the land on account of its being a part of a reservoir site, and that there were other circumstances affecting the price which the land would bring, upon a fair sale in the market.

The commissioners of appraisal, under the law of the State of New York, were entitled to make all

inquiries outside of the record, as well as upon the record, concerning all facts which any reasonable and prudent man would make, who desired to ascertain the fair and reasonable market value of his property, as between a willing seller and a willing buyer, and the findings of the commissioners, supported by a large mass of uncontradicted and undisputed testimony contained in the record, as well as by all other facts which the commissioners of appraisal investigated outside of the record, upon which they found that the market value of this property was actually enhanced, constituted a question of fact, which the Special Term, sitting as an appellate tribunal, could not disturb.

POINT III.

The findings of the commissioners of appraisal constituted a finding of fact, that the market value of the parcel of land in question had been enhanced, by reason of the fact that it was part of a natural reservoir site, for which there had been previous demands in the open market.

In *Matter of Simmons*, 130 App. Div. 350, at pages 354-355, the Court says:

"It was for the commissioners to determine whether the land was really salable and marketable as a part of a reservoir site, and if they so found, the real price or sum that could be obtained for it. The appel-

lant did not prove, or attempt to prove that the value of the property in question, or any of the property included in the reservoir site, had been increased by its adaptability or availability for reservoir purposes, before the commencement of this proceeding. There is no shadow of evidence of any prior demand for the property as a reservoir site, or of any customer who would give more for it for that purpose, or of any circumstances by which the value of the parcel in question, as a part of a natural reservoir site, could be estimated or determined. In the absence of such evidence, it is plain that the appellant has received the benefit of everything which enhanced the value of his property, except the increase caused by the taking of it by the City. The offer was in effect to prove an increase in value, due to the selection of the site by the City, and the proceeding to acquire it."

In the case at bar, the defendant in error proved, without objection, and beyond contradiction, that there had been a number of prior demands for this reservoir site, long before the City commenced to acquire it, and that these demands had enhanced its market value.

The findings of the commissioners of appraisal were not only based on overwhelming evidence in the record, but as this Court says in *McGovern vs. The City of New York*, 229 U. S. 363, p. 371:

"It hardly even is so strong as that; for the ruling of the commissioners is not to be taken as an abstract universal proposition, but the judgment concerning this particular case, found by men, presumably as the plaintiff in error says, men of experience, who had or were free to acquire outside information, concerning the general conditions of the taking, and the selected site."

The Special Term, which confirmed the report of the commissioners of appraisal, having sat as an appellate court under the procedure in New York State, was confined to an examination of questions of law arising on the record, or brought up by a bill of exceptions. No objections were filed to the report. The credibility of witnesses, and the probative force of facts introduced in evidence, were the sole province of the commissioners of appraisal, and a re-examination of such questions would be an exercise of original jurisdiction.

People v. Fish, 125 N. Y. 137, at 150.

People v. Cignarale, 110 N. Y. 23.

It is a fundamental principle of appellate procedure that decisions of a trial court on questions of fact, will not be reviewed on appeal, whether the case be civil or criminal, at law or in equity.

New York v. Smith, 138 N. Y. 676.

An appellate court will presume, in review of an inferior judicial tribunal, that it has complied with all the requirements of law, and that its determination rested on facts sufficient to sustain them.

Knight v. Willson, 9 N. Y. Supp. 20;

Gibbons v. Van Alstyne, 9 N. Y. Supp. 156;

Mandeville v. Reynolds, 68 N. Y. 528, 534.

A mere suspicion or color of error is not sufficient, but every reasonable intendment establishing the irregularity of the decision rendered, must be removed, as all doubtful interpretations will be

resolved in favor of the validity of the action of the trial Court.

Devlin v. Greenwich Savings Bank,
125 N. Y. 756;

Jenks v. Smith, 1 N. Y. 90, 94.

Assuming, however, for the purpose of argument, that the Special Term had the power to modify the award made by the commissioners of appraisal, and further, that the findings of the commissioners of appraisal, although based upon abundant evidence, constituted an abstract universal proposition and not their judgment, concerning this particular case, the evidence is clear that they followed the ruling of the State Courts, and that their findings were not only in conformity with the rulings of the State Courts, but, also, with numerous decisions of this Court.

POINT IV.

The commissioners of appraisal followed the decisions of the State Courts.

It appears from the record before this Court that there were numerous demands for the reservoir site, of which the property owned by defendant in error was a part, which enhanced its market value, and made it salable at some price over and above its mere agricultural value.

Evidence Showing Prior Demands.

The Ramapo Water Company, which was organized in 1898 or 1899 (p. 83, fols. 247, 248), was

organized, according to the testimony of Mr. J. Waldo Smith, the plaintiff in error's chief engineer,

"On the hope of being able to sell water
to the City of New York."

The Ramapo Company was formed to supply water to municipalities (p. 84, fols. 250 to 251; p. 468, fol. 1403). This company had made formal applications to supply water to Brooklyn and had informally applied to supply water to New York City (p. 84, fol. 251). This company contemplated acquiring the Ashokan reservoir site and, with that end in view, had filed maps, made surveys of portions of the site and eventually would have filed maps of every portion of the site (p. 84, fols. 251 and 252). They contemplated acquiring the site (p. 84, fols. 251 to 252).

In the course of acquiring the lands which composed the Ashokan reservoir site, Mr. Nostrand, who subsequently acted as the chief engineer for the Ramapo Water Company (p. 83, fol. 249), went to Ulster County in the line of his duty to personally buy the lands which formed a part of this site at as cheap a price as he could obtain for them (pp. 84, 85, fols. 252, 254). For a number of years, extending probably from 1894 or 1895 to about 1900, he made contracts with certain parties upon the site of this reservoir at controlling points for the purchase of land and paid down on those contracts the first payment. Some of those contracts were renewed and extended upon further payments for several years (p. 85, fols. 253, 254). About the year 1899 a large number of contracts (probably 50 to 60 contracts) were made in this section (p. 85, fols. 254, 255).

✓The owners of the lands which had been acquired

and of the other lands which the Ramapo Water Company contemplated acquiring knew that they were to be used for reservoir purposes (p. 85, fols. 254, 255). This knowledge had an effect on the price of the land (p. 85, fols. 254, 255). When it became known throughout that section that these lands were being purchased for reservoir purposes, the price of the remaining land went up to some extent and contracts were mostly made within a few days so as to prevent the rise in value (p. 85, fols. 255, 256).

It was well known throughout that section of Ulster County, that there was a demand for these lands for reservoir purposes (p. 86, fols. 256, 257).

The Ramapo Company contemplated constructing a reservoir upon the Ashokan reservoir site and impounding the water there, constructing an aqueduct to run from this reservoir to the city line, and making a contract with the City of New York to sell this water to it at \$70 per 1,000,000 gallons (p. 87, fols. 260 to 262). The Corporation Counsel of the City of New York had actually drawn up a contract between the city and the Ramapo Water Company for the purpose of signature (p. 87, fols. 261, 262, at bottom of page). This contract provided for the sale of 200,000,000 gallons per day from the Ramapo Company to the city at a net profit of about 20 per cent. on the selling price, after allowing for the payment of interest on bonds (p. 88, fols. 262, 264). This project, if carried out, would have netted to the Ramapo Company a profit, over and above all interest charges, of over \$5,000,000 a year.

It also appears from Claimant's Exhibit G, February 15, 1911, page 88a, which is a compilation from official records of the Water Commissioner's

office in New York City showing price paid by the consumers in the city for water during the year 1900, that the price paid ranged from \$100 per 1,000,000 gallons to \$500 per 1,000,000 gallons.

The Ramapo Company contemplated getting this 200,000,000 gallons of water per day from the development of the Esopus Creek watershed alone (p. 89, fol. 267).

The Ashokan reservoir site is the largest reservoir site in the Esopus watershed. The whole project, which the City of New York is now about completing, consists of damming up the Esopus Creek at the narrow neck of this reservoir site and backing up the waters into this great basin.

Appendix No. 2, pages 414 to 418, folios 1240 to 1254, contains the list of contracts made by the Ramapo Company to purchase land. It gives the names of the proposed vendors, the dates, the purchase price and indicates, in a general way, the locations.

In some instances, when a renewal of these purchase contracts was requested the owners demanded a higher price and the contracts were renewed at an increased price.

Joseph S. Hill, of Olive, who it will be conceded has been a perpetual witness for the City of New York and who testified in the City's favor against a large number of claimants, to very low valuations, on property not owned by him, had a piece of property of thirty acres which he offered to sell to a representative of the Ramapo Company for \$2,500, or at the rate of \$83 $\frac{1}{3}$ per acre (p. 92, fols. 275, 277).

The Ramapo Company contemplated furnishing water to other communities besides New York City. Included in these other communities were Albany,

Newburgh, Kingston, Poughkeepsie and a number of small places between New York and Albany (p. 93, fols. 277, 279). During 1899 and 1900 and from then on, there was a great demand for water from these various cities (p. 93, fols. 278 and 279). The populations of these cities through the Hudson Valley were increasing all the time, as is shown in the Census Reports (p. 93, fols. 278, 279).

The City of Kingston had, as early as 1893, sought the Ashokan site as the source of its own water supply and from then on until 1897 this matter was very seriously considered by the City of Kingston. A copy of all the proceedings of the Common Council of that city and of its committee relative to obtaining a source of water supply from this site was offered in evidence and forms a part of this record (pp. 419 to 470, appendix No. 3). An inspection of this testimony will show this court how great a demand there was for this site and how profitable this property is.

Commissioner Chadwick, one of the members of the Board of Water Supply of the City of New York, testified (p. 55, fols. 164, 165) that he understood that prior to the time that the city investigated the Ashokan reservoir site as a probable source of its water supply, the Ramapo Company had acquired an option on a considerable part of the site.

Cornelius C. Vermeule, one of the ablest and most experienced water supply engineers in the country, testified that the demand for water within 100 miles of the Ashokan reservoir site amounted to about 738,000,000 gallons per day in 1907 and is increasing at the rate of about 50 per cent. each ten years which will call for 1,107,000,000 gallons a day by 1917 and 1,660,000,000 gallons per day by

1927 (p. 187, fols. 560, 561). This demand for water on the part of various communities within 100 miles from this site has been very great for ten years prior to 1907 (p. 187, fols. 560 to 561). This demand will absorb all the good available reservoir sites near New York City within the next twenty years (p. 187, fols. 560 to 561). This demand for water comes from New York City, from all the cities up the Hudson as far as Cohoes and Schenectady and from New Jersey within twenty miles from New York City (pp. 187, 188).

Some of the cities in New Jersey which demand water are Jersey City, Newark, Paterson, the Oranges, Passaic and Elizabeth and other cities, having an aggregate population of about 1,500,000 (pp. 187, 188). These cities are continually growing in population (pp. 187, 188).

All of the public records on file, the public press, including all of the large newspapers of the City of New York and many of the most important magazines throughout the country, show that the public mind was inflamed on this subject, long before the City of New York commenced this proceeding, and that prior demands actually existed for these lands for water supply purposes. The evidence will show that prior demands, and in many cases urgent ones, existed on the part of many cities, towns, villages, communities and localities for potable water, for pure water and for this very water, and that this site was the most available source from which the demands could be supplied. That there were previous demands by private capitalists, as well as by municipalities, for this very site and for this very purpose cannot be disputed. And a reference to the Parrot plan 1886, R., 1887, and Kingston, 1893, proves this (see Burr-Herring-Freeman report).

Peekskill, Newburgh, Poughkeepsie, Yonkers,

Brooklyn, Schenectady, Cornwall, Middletown, New Paltz, Highland Falls and other localities demanded this water long before the statute under which New York City is now condemning this property was passed. There had been from 1886 until 1900, agitation by the public press and magazines on this very subject (Freeman Report, 188; Report to the Hon. Bird S. Coler, 1900, and Merchant's Association Report, 1900). In addition to these three reports there have been others since that time and great advances in the market valuations of the properties in the Ashokan reservoir section had taken place long before the first City Commissioners were appointed and had qualified to condemn the land some time in 1907.

The Metropolitan and local press had many leading articles, double and single page illustrations, drawing attention to these lands and their increase in value long before the appointment of the first Commissioners of Appraisal. Among other papers are the *New York Herald, Sun, World, Journal* and *Kingston Freeman*.

Mr. Robert E. Horton, an eminent hydraulic engineer, who has been continuously engaged for the past fifteen years or thereabouts in connection with water supply, water power and canals as consulting engineer for several water supply corporations, for several municipalities on water matters, and as consulting engineer of the Geological Survey during 1900 to 1906 (p. 228, fols. 683, 684), testified that beginning in 1901, he had made examinations of the Esopus water shed at different times from 1901, up to the present time (p. 230, fols. 689, 690). He further testified (pp. 234, 235, fols. 700 to 704), that there was a demand for water by the City of New York, and by a large

number of other communities along the Hudson, on or about May 22, 1909; that that demand had existed for a long period of time prior to May 22, 1909, especially as regards the City of New York, and, to some extent, as regards smaller communities. The requirements for water have continuously increased from time to time and steps have been taken to meet the demand, but it has never been fully met and the demand has increased, as well as the requirements.

As available reservoir sites were taken out of the market, the supply for meeting the demand was to some extent diminished (p. 234, fol. 702). The cities in New Jersey in close proximity to New York needed water and took up the available reservoir sites surrounding them (p. 234, fol. 702). From time to time since 1825, the City of New York absorbed the larger, better, and more feasible water sites that were adequate to supply it with water (p. 234, fols. 702, 703). It took the Croton supply, Byram Pond and it absorbed all sources of supply in Westchester County, excepting such small sources as were necessary to supply local communities and that were not adequate to supply small communities (p. 235, fols. 703, 704). The next available and feasible source of gravity supply was the Ashokan reservoir (p. 235, fols. 704, 705). The City of New York has absorbed practically all the available reservoir sites. The City of Albany investigated all the available reservoir sites extending down to the Catskill streams now being taken by the City of New York, contemplating at one time to take these same Catskill streams but abandoning that project because of its cost, and finally

adopted a supply from the Hudson River by pumping and filtration at great cost.

The waters of the Hudson River, below the point where it leaves the Adirondack region, are not, comparatively, pure. Albany has to filtrate its water twice (p. 264, fols. 706, 707). It appears that in the Technical Press that the cities of Yonkers and White Plains are looking for water. The demand for water has increased continually more rapidly than the increase of population (p. 236, fols. 207, 208). The absorption of various reservoir sites within the immediate proximity of Yonkers, White Plains, Troy, Albany and the various cities in New Jersey and other cities and places has enhanced the value of reservoir sites locally within a radius of New York (p. 235, fols. 708, 709). Throughout the State, generally, there is a notable increase in reservoir sites within the past ten or fifteen years (p. 236, fols. 708, 709). This has been due, in part, to the increased urban population and increased use of water *per capita*; in part to a better appreciation of the value and necessity of supplying pure water, and, in part, the increased value of reservoir sites has resulted from a general extension of water power development and the extension of storage for the purpose of increasing water power (p. 236, fols. 708 to 710). Reservoirs are now considered feasible in many localities where they were not thought of a few years ago. This subject of the conservation of our natural resources has become one of live discussion on the part of the President of the United States and Congress in recent years (p. 237, fols. 709, 710).

The witness, in the course of his experience as an hydraulic engineer, became informed to the effect

that certain States in the Union recognized reservoir land as more valuable than the same land for agricultural purposes (p. 238, fols. 714, 715). He was familiar with the so-called "Mill Acts" of the States of Connecticut, Massachusetts and Maine, and he was informed that in Connecticut there is a rule that an additional allowance, over and above ordinary agricultural value, shall be made for reservoir lands. The allowance, as stated to him, is one and one-half times the value of the land for other purposes (p. 239, fols. 715, 716).

It, therefore, clearly appears from all of this evidence, which was not before the State courts when they decided the two cases upon which the plaintiff-in-error relies; that there were prior demands for the Ashokan reservoir site for reservoir purposes and, consequently, the defendant-in-error is entitled under the decisions of the New York State courts to have his land valued by taking that fact into consideration.

As the Circuit Court of Appeals says:

"Its availability for furnishing New York with pure water was appreciated fourteen years ago, when the Ramapo Company was organized for the purpose of selling the water in question, not only to the City of New York, but to other cities of the State located on both banks of the Hudson. The availability of the Ashokan site induced the City of Kingston to make a careful examination of its capacity for furnishing a supply of water to that city. In short, without entering further into details, it can hardly be disputed that the Ashokan site was the natural place for the reservoir which is to supply the fast increasing multitude of people who dwell on both sides of the Hudson and that this availability has been proved and was publicly known long before the City of New

York instituted these proceedings. It must have been evident to all intelligent land owners that their property would, in the near future, inevitably be acquired as part of an immense water system. That this demand increased the value of these lands follows as a necessary conclusion. To value them only according to the tons of hay or the bushels of potatoes they produce, ignores the other elements of value, namely, that their possession was necessary in order that water might be furnished to the increasing millions along the banks of the Hudson."

Although the Circuit Court of Appeals preferred to place their decision upon the ground that the evidence in this case showed, as a matter of fact, that the prior demands for this reservoir site had increased the market value of the parcels of land composing it, to some slight extent, and that the award made by the commissioners of appraisal in this case, allowing this slight element of value for that reason should be sustained; although the learned Circuit Court of Appeals held that the decisions of the courts of the State of New York were not in conflict with their opinion, and that, to use the language of the Circuit Court of Appeals (p. 524, fol. 1571)

"there is, in the present case, evidence that the Ashokan site had long been known, and its availability as a great reservoir recognized by experts and business men, and efforts to acquire it had from time to time been made. If the State Court had passed upon the identical question presented by the evidence in the case at bar, we might feel constrained, in the absence of a controlling authority of the Supreme Court, to follow their decision, but, for the reasons just stated, we cannot

find that they have passed upon the precise question involved in the cases relied on by the plaintiff in error”;

although the learned Circuit Court of Appeals, therefore, applied the principles of law enunciated by the courts of the State of New York, to the particular evidence before them in the case at bar, Judge Lacombe preferred to place his decision upon the broader ground clearly enunciated in the case of *Boom Co. v. Patterson*, *supra*, which squarely holds that an owner is entitled to this element of value in his land, regardless of the existence or non-existence of any prior demands for his property, for such purposes.

We will show that the principle of *Boom Co. vs. Patterson*, which has been followed with approval for years by courts all over the country, is not only well-settled authority, but is based on sound reason, and that the cases of

Boston Chamber of Commerce v. Boston, 217 U. S. 189;

United States v. Chandler-Dunbar Co., 229 U. S. 53;

McGovern v. City of N. Y., 229 U. S. 363;

Minnesota Rate Cases, 230 U. S. 352,

have no application to the facts in the case at bar.

Before, however, discussing the doctrine enunciated by the foregoing cases, we desire to call this Court's particular attention to the fact:

POINT V.

That the adaptability of land, for use as a reservoir, or for water supply purposes, has been uniformly taken into consideration, as an element of value of such land, in a number of well decided and carefully considered cases, both in the United States and Great Britain.

In the *Matter of Gilroy*, 85 Hun, 424, the Court said:

"The commissioners practically held that the availability of the property for use in connection with the water supply of New York City could not be taken into account by them in determining what was the fair market value of the premises. In so doing, it seems to me that they disregarded the great weight of authority as to the proper measure of compensation in cases of this kind * * * 'Here was a narrow strip of land,' said Boardman, *J.*, 'formerly used as a way and only of value for a way. The owner holds it for such purpose only expecting the time will presently come when he can utilize it to his own profit or sell it to some one else for such purpose. Why then are not the purposes for which it is held and the uses to which it is adapted proper elements in its value?'

"The same question may be asked with reference to Lake Gilead in the present proceeding. To ignore its adaptability to furnish water to the City of New York is to leave out of consideration the most important element which gives it any value in the market."

Then, after citing the *Boom Company v. Patterson* and a number of other cases, the opinion proceeds:

"Without further citation of authority, I think it is sufficiently clear that the commissioners in the case at bar erred in excluding from consideration an essential element of the market value of the property under condemnation, that is to say, its adaptability to furnish a portion of the water supply of the City of New York. It follows that their report should be set aside."

In the *Matter of Daly*, 72 App. Div. 396, the Court says:

"It was proper to consider as an element in the market value of the property to be taken, the existence of a demand for such property on the part of the city; this does not authorize an inquiry as to what that particular property was worth to the city."

In re Gough, L. R., 1 K. B. 417, Lord Alverstone, writing the opinion of the Court, said:

"Naturally the peculiar adaptability of the land for a reservoir should be taken into consideration in fixing the compensation to be awarded."

In a very well considered work entitled "Law of Compensation" by C. A. Cripps, Q. C. (4th Ed.), published by Stevens & Sons, Ltd., in 1881, and brought down to 1900, the author states the law as follows:

"The general principle has been applied in a certain number of particular cases under the name of special adaptability. It must, however, be clearly understood that special adaptability does not imply any deviation

from the principles to be applied in all compensation cases. An owner is entitled to have the price of his land fixed in reference to the probable use which will give him the best return and the term 'special adaptability' only denotes that the probable use from which the best return may be expected is special in its character.

"The question has generally arisen in connection with reservoir sites where, from natural physical causes, land is situated and probably may be used for the construction of a reservoir. In *Riddel v. New Castle Water Company* (held in the Court of Appeals on 13th of June, 1879, but not reported), an award was upheld by the court in which the arbitrator had taken into consideration the peculiar value of the lands on account of their fitness for the purpose of a reservoir or water supply. This case was referred to in the subsequent case of *Manchester Corporation v. Countess Ossaliski* (held in W. B. D. of the High Court on 3-4 April, 1883, but not reported). An application was made by the corporation to set aside the award on the ground that the arbitrator had taken into consideration the enhanced value of the land on account of its capability to being used as a reservoir; but it was held that this enhanced value might properly be taken into account as an element of value just as the probability that by the extension of a town, agricultural lands would acquire an enhanced value as building land."

In the case of *Manchester Corporation v. Countess Ossalinski*, a very exhaustive statement of the law applicable to the case at bar is contained in the judgment pronounced by Judge Grove and concurred in by Judge Stephens who sat with him. The opinion in that case is set forth at length in a brief filed by James Danne in the Court of Appeals

of New York State in the *Matter of Brookfield* (76 N. Y. 138), (Vol. 2043, N. Y. Law Institute Library). The opinions in that case will be referred to and quoted from later on in this brief.

See also:

College Point v. Dennett, 5 N. Y. Sup. Ct. R. (T. & C.) 217; 2 Hun, 669.

Great Falls Mfg. Co. v. U. S., 16 U. S. Ct. of Claims, 160, aff'd. 112 U. S. 645.

Gearhart v. Clear Spring Water Co., 202 Pa. St. 292.

Moulton v. Newburyport Water Co., 137 Mass. 163.

San Diego Land & Town Co. v. Neale, 78 Cal. 63.

Sargent v. Town of Merrimac, 81 N. E. R. 970; 196 Mass. 171.

Seattle & Montana Ry. Co. v. Murphine, 4 Wash. 448, 456, 457.

Spring Valley Water Works v. Drinkhouse, 92 Cal. 528.

Lewis on Eminent Domain, Sec. 479.

Sedgwick on Damages, Vol. 4, Sec. 1179.

In answer to the contention that the availability and adaptability of the property being condemned for reservoir or water supply purposes was speculative, fanciful and visionary, because it had never before been actually used for such purposes, the Queens Bench Division of the High Court in Great Britain said in the *Ossalinski* case:

"Then comes the second head of objection, 'that the arbitrator has taken into considera-

tion the increased value of the land in consequence of the powers conferred in the Corporation of Manchester by the Manchester Corporation Water Works Act, 1879, and has taken into consideration the value of the land to the Manchester Corporation used for the purpose of carrying out the objects of the higher powers conferred by the said act.' That would be a serious *objection to the award, and a fatal one, because as far as my experience goes it has been the invariable practice, sanctioned by the courts, that arbitrators are not to value the land with reference to the particular purpose for which it is required, particularly where the matter is under Parliamentary powers with reference to what the parties who are taking the land under compulsory powers are obliged by their necessities, or what they suppose to be their necessities, to pay for it there—that is to be excluded from consideration, and the only way it can or ought to be put forth at all is, as a possible illustration of the probability of the land being useful for such a purpose. You must not look at the particular purpose which the defendants before the arbitrators are going to put the land to when they take it under Parliamentary powers or undertakings for any special purpose, but you may possibly use it as an illustration to anticipate or to answer an argument that the schemes thrown out by the plaintiff in this case are going to enhance the value of the land are not visionary, but are schemes with certain probability in them. I do not see any objection to that being used as an argument. That is a matter of fact."*

In *Great Falls Manufacturing Co. vs. United States*, 16 U. S. Ct. of Cl. 64, aff'd. 112 U. S., where the City of Washington was acquiring water supply property for an addition to its water supply,

and where there had been no prior demands for the property for such purposes and no inflammation of the public mind, this Court affirming the opinion of the Court of Claims, 16 U. S. Ct. Cl. 160, 190, 199, approved the following language:

"It is no answer to this view to say that the claimants could not have themselves made as advantageous use of this property. That objection is at once met by retorting that the government could not have made as advantageous use of any other property of a like nature which was indispensable to the objects to be attained. The substitution of such other property would have involved the expenditure at the very lowest estimate of double the amount of the cost of the works as they have been located. It is not pretended that the damages of the claimant are to be measured solely by the savings of the government, but such savings are not to be lost sight of in determining the value of the property."

In the *Matter of Gilroy*, *supra*, which Special Counsel for The City in the State Courts claimed, together with the *Boom Co.* case, was bad law, Judge Bartlett, writing for the Court, said, *Matter of Gilroy*, 85 Hun, 424, at 426:

"The doctrine that the fitness of lands for particular purposes is an element in estimating their market value in condemnation proceeding, is supported by the decision of the United States Supreme Court in the case of *Boom Co. vs. Patterson*, 98 U. S. 403."

Again, the opinion continues:

"A similar rule as to the measure of compensation where the power of eminent domain is exercised for the acquisition of reservoir sites has been laid down in the

number of cases. *San Diego Land Co. v. Neale*, 78 Cal. 63; 20 Pac. 372; *S. V. Waterworks v. Drinkhouse*, 28 Pac. 6811; *Alloway v. City of Nashville*, 88 Tenn. 412; 135 W. 123. In the case last cited, it is well stated that market value includes every element of usefulness and advantage in the property. If it be useful for agricultural or residential purposes, if it has adaptability for a reservoir site or for the operation of machinery.

* * * * *

If it possesses advantages of location or is available for any useful purpose whatever, all these belong to the owner and are to be considered in estimating its value.

Without further citation of authority I think it is sufficiently clear that the Commissioners in the case at bar erred in excluding from consideration, an essential element in the market value of the property under condemnation. That is to say, its adaptability to furnish a portion of the water supply of the City of New York. It follows that their report should be set aside."

See, also, 15 Cyc., pp. 757, 758.

POINT VI.

The commissioners of appraisal, the United States Circuit Court, and the United States Circuit Court of Appeals, were right in holding this case within the principle laid down in *Boom Co. v. Patterson*, 98 U. S. 403.

Before the State Courts, counsel who argued *Matter of Simmons*, 130 App. Div. 350, 356, contended, as we have shown, that the case of *Boom*

Co. v. Patterson, was not in line with the best authority. The present counsel for the City on this appeal, evidently do not impugn the weight of the authority of the *Boom Co.* case, but seek to have this court hold that it is inapplicable to the facts here in evidence.

Such a contention naturally necessitates a brief reference to the facts in the *Boom* case, for the purpose of ascertaining the exact principle there enunciated.

In the *Boom* case, the facts were that the Boom Co., a corporation, was engaged in the lumber business, and was authorized by its charter to construct booms on the Mississippi River, between certain points in the State of Minnesota, and to enter upon and condemn lands for that purpose. A boom is a natural or artificial enclosure in a stream, suitable for stopping the progress of logs and lumber as they float down stream, and for catching, holding, storing and protecting them. Patterson, the claimant in that case, owned two islands, and a part of a third island, in the Mississippi River. These islands were about a mile in length, and ran parallel with the west bank of the river. The distance between the islands and the river bank was about one-eighth of a mile. By connecting these islands by suitable construction work, with the west bank of the river, a boom of enormous dimensions, capable of holding in safety over twenty million feet of logs, could be formed. These islands, together with the west bank of the river, were especially adaptable and available for the construction of a boom. For any other purpose, Patterson's property was of little more than nominal value. Patterson had no franchise to build booms, or to acquire lands for that purpose.

There was not a particle of evidence in the *Boom Co.* case, from beginning to end, that there ever had been any prior demands for these islands, for boom purposes, or that the public mind had ever become inflamed over the question, or that that had in any way affected the value of these islands.

Apart from the value of these islands for boom purposes, the jury found their value as wild mountain land to be \$300.00, but in view of their adaptability for boom purposes, the jury gave them an additional value of \$9,058.33, making a total valuation of \$9,358.33. Patterson consented to reduce the verdict to \$5,500.00, and judgment for that amount was entered in his favor. Sustaining this judgment, this Court says (*Boom Co. v. Patterson*, 98 U. S. 43, at p. 48) :

“The position of the three islands in the Mississippi River, fitting them to form in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty million feet of logs, added largely to the value of the land. The Boom Co. would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river, as by utilizing them in the manner proposed, they could save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon, as an element in estimating the value of his lands.”

Counsel for the City claim (pp. 21-23 of their brief) that before the principle of the *Boom Co.* case can be applied, it must be established that the owner of the property could, and in all probability would have used the property in the same manner

as the condemning party expected to use it, and have thus been able himself to have acquired gains or profits.

This Court, in another part of its opinion in the *Boom Co.* case, expressly repudiates such a contention, by saying:

"Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless, because he is unable to put it to use. Others may be able to use it, and make it subserve the interests or conveniences of life. Its capability of being made available gives it a market value which cannot be easily estimated."

According to the contention of counsel for the City, if a man owns a valuable undeveloped gold mine, worth in the open market a million or two dollars, but if he himself has not sufficient of his own funds to develop the property, and, consequently, if he is compelled to sell the property to some large corporation, which may spend fifteen or twenty million dollars in developing it, the property in the hands of the owner is absolutely worth only its agricultural value.

The reservoir site, in the case at bar, was not only in a condition where it could at once be used, and where it was presently available for water supply purposes, but there were existing demands for it for such purposes, not only on the part of the City of New York, but on the part of other localities, and these demands had actually enhanced the market value of every part of the site.

Counsel for the City, however, contend that the defendant in error is not entitled to this element of value, because, to use their own language,

"There is no authority holding that where the land, taken by itself, or in conjunction

with other lands to be acquired, may be made available and adaptable for a use by the expenditure of money or labor, and thus its existing form changed into something different, that enhanced damages can be given as increased value by reason of its general adaptability for the use for which it has been condemned."

This is exactly what the *Boom Co.* case, and all of the numerous decisions, many of which will presently be referred to, hold.

In the *Boom Co.* case, the two and one-half islands owned by Patterson could not have been constructed into a boom by the Boom Co., unless that company spent a very large amount of money in connecting these islands with the west bank of the Mississippi River. In other words, the Boom Co. had to spend sufficient money to build a dam one-eighth of a mile long, from the end of one of these islands to the west bank of the river, in order to create the boom.

There was no evidence in the case that Patterson could have used his islands for boom purposes, or that he had sufficient money of his own with which to construct the boom in question, or that he was in the lumber business, or knew anything about that business.

This Court placed its ruling on the broad, intelligent and sound ground that the availability and adaptability of the islands, for boom purposes, was an element to be taken into consideration in determining their fair and reasonable market value, and the *Boom Co.* case, notwithstanding the assaults now attempted to be made on it, has become imbedded in the jurisprudence of this country as an authority for the proposition that the

peculiar adaptability of lands for particular purposes is a circumstance which must be taken into consideration in estimating their value.

It must be conceded that the owner of property taken by force of the power of eminent domain is entitled to "just compensation." The amount of money to be awarded to him is not the value of his property to the condemning party, and he is not entitled to have its value measured by the benefits to be bestowed upon the property by the condemning party after the latter has acquired it. He is not permitted to take advantage of the necessities of the condemning party. He is, however, entitled to have the value of his property considered with reference to its adaptability for any and all uses to which it may be devoted.

Lewis on Eminent Domain (3rd Ed.), Vol. 2, p. 1233, Sec. 707, says:

"The market value of property includes its value for any use to which it may be put. If by reason of its surroundings or its natural advantages or its artificial improvements or its intrinsic character it is peculiarly adapted to some particular use, all the circumstances which make up its adaptability may be shown and the fact of such adaption may be taken into consideration in estimating the compensation."

In *Sedgwick on Damages*, Vol. 6, Sec. 1075, it is said:

"The peculiar fitness of land for particular purposes is an element in estimating its value which may be shown, and when it appears as a fact in solving the problem of market value. (*Santa Anna v. Harlin*, 99 Cal. 538; *San Diego Land, etc., Co. v. Neale*, 78 Cal. 63; *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528.)"

In *Lewis Valley Ry. Co. v. Ryan*, 64 Miss. 399, the Court sustaining upon appeal a ruling, admitting evidence to show the peculiar value of property as a mill site, said:

"Clearly it is of insignificant value for agricultural purposes and there is neither a wharf, a factory or a saw mill on it and there may never be, but if its adaptability for these purposes or any one of them gives it a present value the owner is entitled to that value, though in fact no one now proposes to use it for any of these purposes."

In *Seattle & Montana Ry. Co. v. Murphine*, 4 Wash. 448, at pages 456, 457, the Court said:

"The market value of property is its value to any use to which it may be adapted and, in estimating its value, all the uses for which the property is susceptible should be considered and not merely the condition it may be in at the time and the use to which it may have been put by the owner."

In *Matter of Staten Island R. R. Co.*, 10 N. Y. St. Rep. 393, where land was taken for railroad purposes, it was held error for the appraisers to exclude from consideration the value of the land for any and all purposes to which it was suitable, the Court saying:

"Any prudent proprietor, seeking to decide the price at which he would be willing to part with his estate, would be chiefly, if not entirely controlled in his decision by the knowledge that his property presented special advantages which would eventually cause great corporations to struggle for their possession."

In *Sanitary District v. Loughran*, 160 Ill. 362, at page 365, the Court said:

"It is not denied that the owner was entitled to receive the highest price for which the land could be sold for any purpose, nor if it had a special value by reason of its being stone producing land, the owner is entitled to compensation according to its value as such."

In *Payne, et al. v. Kas. & Ark. Valley Ry. Co.*, 46 Fed. Rep. 546, at page 557, the Court said:

"In a proceeding to condemn a site for a railroad bridge, evidence to show that the land required for that purpose possessed peculiar advantages as a bridge site is admissible as affecting the question of value. In the case of *Ry. Co. v. McGhea* (44 Ark. 202), the land appropriated by the railroad company was worthless for habitation or cultivation, but its prospective value for a ferry landing to be established for the future was allowed in the estimate of damages."

Without multiplying quotations further on this subject, it appears clearly that the owner of property which is taken by force of the power of eminent domain has a right to have his property valued with reference to its adaptability for any and all uses to which it may be devoted.

Applying this well-settled principle of law to the facts of the case at bar, we find:

That the City is condemning property from which it will derive a great commercial profit.

This case is different from that of a public park or public school, or fortification, where the property is condemned exclusively and solely for public benefit and where the property is not adaptable to profitable uses.

The City is here condemning the best, cheapest and most available reservoir site, for the purpose of supplying to its growing population of four and one-half millions of inhabitants, and, to the steadily increasing millions of other cities and communities, along the Hudson valley, a necessity of life, at a large pecuniary profit to itself.

The City is acting in this business, in just the same way that a private water corporation would. Its inhabitants need water. Instead of permitting a private water company to acquire this water supply and to supply all of these inhabitants at a profit, the City, itself, is going into the business.

This business has two sides, a private side, and a public one. Water is a private necessity, as well as a public utility. It is the subject of purchase and sale, just the same as other merchandise, except that there is, in the water business, a minimum of risk, and a maximum of profit, on the investment. The customers are under the control of the City. They must have its wares. They are constantly increasing in numbers. Available reservoir sites are becoming scarcer, as every source of supply is taken out of the market. The demand for water grows continually. Consequently, the price of water is becoming higher, in accordance with the laws of supply and demand, while all the time, the good will of the business is ever increasing on account of the constantly increasing population.

The City secures a safe and profitable business and one that is certain to become more and more profitable, as time goes on.

The City has customers, *i. e.*, has the demand for this water, and, under the statute, has the absolute right to sell water to its own inhabitants and millions of other customers, at a profit. The demand

for this water exists and is growing with great rapidity. This fact cannot be gainsaid.

The one indispensable factor of the business is the supply. The best and cheapest supply is the Ashokan reservoir site, together with the streams of pure water, which flow through and are tributary to it. Without this property, the City cannot enter into this business, except at a loss of hundreds of millions of dollars to itself. With this property, it saves these millions. The source of its profit, is this water supply property. Notwithstanding these undeniable facts, it seriously contends that the owners of this water supply shall not be awarded a cent more, than the value of similar agricultural property, not adaptable or available for water supply purposes. It argues that an allowance of any enhanced value inherent in this property on account of its availability and adaptability for water supply purposes, is necessarily taking advantage of the City's necessities and valuing the property, in accordance with the benefits, which the City places upon it.

It is true, that the owners of this site are not entitled to its future value, but its prospective value must be taken into consideration, in order to determine its present inherent value.

The Court's attention is directed to the fact that, even if the City of New York pays twice or three times more for these lands than it is now paying under the awards already made, the cost of the lands will be only a small item, compared to the amount to be expended. The heavy costs of this proceeding have been not for the lands, but for the other expenses. In fact, it was estimated that up to February 1st, 1909, that the cost of condemnation exceeded the price paid for the lands.

If the City should pay \$200 an acre for lands, the total to be paid for this purpose would be only \$3,000,000 whereas the total estimate of the work is \$161,000,000 and yet, without the land located and adaptable as it is, the plan would be impossible. In fact this reservoir site is the foundation of the entire work, the cornerstone of the whole project.

That the use of this property will result in great profits to the City will be conclusively seen by a casual reference to the record in this case.

Mr. Chadwick, one of the Commissioners of the Board of Water Supply of the City of New York, a hostile witness, testified that after having made a study of the conditions surrounding New York City for some years prior to June, 1905, and as far back as 1897, he had come to the conclusion that the City was badly in need of an additional water supply (p. 39) and that it had been in such need for some time (p. 39).

After a careful investigation, the Board of Water Supply concluded that the best, cheapest and most available source of water supply under all considerations was the Ashokan reservoir and the water shed of the Esopus (p. 40, fols. 118, 119).

The Ashokan reservoir is a natural basin at an elevation of about 580 feet above sea level and about 180 feet in its deepest point (p. 40). One of the advantages of this site is that its elevation above sea level enables water stored in it to flow down by force of gravity into the high buildings in the City of New York, thereby saving considerable expense by obviating the necessity of pumping; or substituting gravity for pumping (p. 41).

When the work which the City is now performing in the construction of this new water system will have been completed, the supply will be a source

of considerable profit to the city (pp. 41 to 43, fols. 123, *et seq.*).

The water rents which will be paid by the inhabitants of New York City within ten years, from the time this water begins to run from this reservoir site, upon the completion of this system will be sufficient to pay for the entire system and thereafter the city will be deriving a net profit of \$10,000,000 per annum (p. 42).

This calculation of \$10,000,000 net profit per annum to the City of New York from the sale of the water which will be impounded in this reservoir site is based on the sale of this water at \$65 per million gallons (p. 42, fol. 126). Water is now selling in the City of New York for \$133 per one million gallons (p. 42, fol. 126).

It follows from the above facts that if the City of New York continues to sell water at the rate of \$133 per one million gallons instead of at the rate of \$65 per one million gallons, it will make, instead of an annual profit of \$10,000,000 an annual net profit of over \$21,000,000.

The Ramapo Company, which contemplated the acquisition of this site and its use as a source of water supply, would not have engaged upon the undertaking unless it naturally thought that it would make great profits and it would have succeeded in making great profits, as the evidence already referred to shows, by selling the water at \$70 per one million gallons.

There is no doubt but what this reservoir site is adaptable for water supply purposes, which means that it can be profitably used for such purposes.

POINT VII.

While, in this case, the evidence is undisputed that there were prior demands for this property for reservoir purposes, not only on behalf of the City, but on behalf of other municipalities, and on behalf of the Ramapo Water Co., it is unnecessary to prove any prior demands in order to entitle the owner to this element of value in his property, and evidence introduced to prove such element of value is not, in any sense, speculative.

First, with respect to the subject of prior demand, it is deemed advisable to say something here on this subject. Demand, as used by the Appellate Division of the State Supreme Court in their opinion, means the personal solicitation or offer to buy from a customer, and is a species of evidence held by the courts to be incompetent.

Heller vs. Paine, 34 Hun, 177.

That such a demand is not essential to prove the market value of property, adaptable and available for a particular use, may be seen by a simple illustration taken from the ordinary case of suburban property in Long Island.

The rapid, steady growth of a great city towards the outlying, contiguous country districts, leads reasonably prudent persons, familiar with real estate conditions and values, to believe, that the purchase of country lands, well and properly lo-

cated, have a great future for suburban, residential or trade purposes. Wise investors purchase Long Island farms, by the acre, anticipating that in the course of several years, the acreage will be ripe for development and division into lots, and for sale in lots to city residents.

As the growth of the city approaches the property, the latter daily appreciates in value, even though there may be no demand for it for suburban residential purposes. There must come a time when there is the first demand. Can it be pretended that prior to the first demand, the property has not increased in value? If it were condemned by the public authorities, the day before the first demand occurred, could they deprive the owner of this element of value, and use the machinery of the law to assess the property at ordinary farm value? The learned Corporation Counsel solemnly assert they could, and abhor any other law, as allowing speculative values.

As it is in the case of the property just referred to, so is it in this case. As long as the City could utilize the various lakes, ponds and other streams comparatively near it, the value of the Ashokan reservoir site was not so apparent. But after all other available sources of supply had been exhausted, in the counties of Westchester and Putnam, which is the case here, it became necessary for the City to seek the next, nearest and cheapest source of supply which would be adequate to meet the growing demands of its increasing population. This reservoir site meets all of the requirements, and for that reason is intrinsically valuable.

Natural reservoir sites, which can be used profitably and commercially, are very few and far be-

tween not only in the State of New York, but throughout the Union. These sites should be likened to, and are far superior to undeveloped coal, oil or mineral lands. The aqueduct is as necessary to convey the water, as the railroad to haul the coal, oil or minerals. Dykes and dams are as necessary to impound the water, as are smelters, furnaces and refineries to commercialize the product of coal or oil.

To say that the expense necessary to put these undeveloped properties into commission, prohibits the owner from obtaining any intrinsic value over and above farm value, because he is unfortunate enough to have his land condemned, is grossly unjust. The advantage, it must be noted, is all in favor of the reservoir. The supply of coal, oil or mineral is more or less speculative and the mine continually depreciates in value, as the product thereof is taken out; while on the other hand this supply of pure and wholesome water, is not only never failing and a known quantity, non-speculative, and a means of profit to the community or owner who puts his property to its best use, but the demand for water and reservoir sites is steadily and continually increasing, and none will gainsay, that water is as much a necessity of life, as coal or oil.

Land frequently has a potential value for certain purposes for which it is not being used; for purposes, sometimes of which no one has theretofore dreamed, and for which no demand has as yet been made. Yet the instant this value is discovered and published by anyone, it is appreciated by many others, and at once constitutes a part of the market value, or if not of its market value, then of its actual or intrinsic value.

The fact that no one up to that time had made a

bid for the property for such purpose or that no one in the vicinity in considering the salability of the land in comparison with other tracts had taken into consideration its peculiar adaptability and consequent value for such purpose is immaterial. Where the public proceeds to take property under eminent domain for the purpose of devoting it to a peculiar use the property is of special value, not only to the public which is about to take it, but to all other persons or corporations engaged in the same or similar enterprises which could use such land in furtherance of their business. It cannot be possible that the mere fact that one public corporation has pointed out the peculiar adaptability of a certain tract of land for its own business would deprive the owner thereof from obtaining through condemnation proceedings the value of the land which he might well obtain if the property were offered to any other similar corporation. Nor can a public corporation estop the owner from claiming such value on the ground that no other bid has been made for the property for such purpose, because the condemning corporation is the first in the field and by its operations it has prevented the owner from offering the property to others, and these others from making a bid for the property.

If the principle contended for by my learned opponents is correct, it follows necessarily that a public corporation which is the first to discover the special advantages which a property has, and for which after discovery there would be many demands, could obtain that property through condemnation proceedings without paying anything for the special value which the property possesses. In other words, the discoverer and not the owner of

the property would receive all the advantages of that special value. It would follow from the further application of this principle, that a public corporation which discovered that land, which had been used solely for farming purposes, contained rich mineral deposits, could obtain possession of the property without paying anything except the value of the land merely for agricultural purposes. Or if a corporation discovered that certain trees, which up to that time had been regarded as weeds, could be used for a special purpose which would render them of great value, it might obtain possession of a great forest tract which up to that time had been regarded as comparatively worthless by paying merely a nominal price.

While it is true that under condemnation proceedings the necessities of the purchaser cannot be considered so as to swell the damages sustained by the owner of property, yet if this necessity consists merely of the desire to use the property as most available for special purposes, which would appeal with equal strength to others besides itself, such availability for that special purpose gives the property an extra value which ought to be considered and allowed to the owner. The mere fact that it has never been considered up to the time of the condemnation proceedings, and consequently has not affected the market price of the property up to that time, is immaterial if it would make the property sell for a higher price to people who could use it for that special purpose. The rule in such cases must be, not that it has swelled the market price, but that it would at the time of the award increase the selling price of the property among other people if they had an opportunity to bid for it.

The sole consideration in the local market would be the adaptability of the property to farm purposes. The small dealers in the vicinity naturally would not speculate upon the value of the property which would attach to it for reservoir purposes, after some corporation possessing millions of dollars should endeavor to obtain the most available site for the purpose of supplying the numerous cities of the State of New York with pure water. The value of the property for that purpose would be considered only by some promoter who would endeavor to dispose of all the property needed for a reservoir to some corporation; or by some public corporation which had been commissioned to supply some great municipality with drinking water.

In order to obtain compensation for the value of the property for this latter purpose, a much wider market would have to be sought and found than the narrow local one. That some promoter had this very locality in consideration, and that a number of municipalities had been searching for the best locality to establish a reservoir for the storage of drinking water, and that there was a market other than the narrow local market, in which this property would have brought the additional price sought for this special purpose, was proved.

A parallel case is found, years ago, in the oil fields of Pennsylvania. There, farm lands were in a day enhanced in value by millions of dollars. There, property which might have brought but a nominal sum if the sale had been restricted to a local market, and to local considerations, realized enormous sums when thrown open to the markets

and to the consideration of the world. So in this case, the local market, and the necessities of the rural community, should not govern the value of this property, since it has been shown that it has a special value for millions of citizens in New York, and in other municipalities. The claimant proved that it is available for this special purpose and that it has an enormous value in such broader market.

"The evidence on the part of the defendants was mainly confined to the amount of wharfage actually collected for the use of plaintiff's property at and immediately preceding the time of its appropriation by the defendants, and the estimate of witnesses of the annual income to be derived from it, and it was this testimony which was adopted and followed by the referee in arriving at his conclusions upon the subject of value. The application of this rule limited the consideration of the question to the actual present productiveness of the property, which might be dependent upon a variety of causes, not affecting its intrinsic value, and which did not therefore, afford a safe or reliable criterion of its worth to the owner. If the sovereign power, in the exercise of the right of eminent domain, could take the property of the citizen at a valuation based upon the net income realized from it, it is feared that a very large part of the farm property of the State could be acquired by it at a purely nominal consideration. *But it is the potentialities of a given piece of property, both developed and undeveloped, which constitute its chief element of value.*"

Langdon vs. Mayor, 133 N. Y. 628-630.

That this element of value is anything but speculative is conclusively proven by the fact that The City of New York is actually condemning this property for water supply purposes, and is spending about \$177,000,000.00 upon a project now almost completed, of which this reservoir site is the most fundamental part, the basin which will store (171,000,000,000) 171 billion gallons of water.

In *Orleans & J. Ry. Co. v. Jefferson & L. P. Ry. Co.*, 51 La. Ann. 1605, at page 1615, the Supreme Court of Louisiana says:

"Simply as land, it must have obviously lost in value, as it can no longer be reached for cultivation; and can only be utilized longitudinally. While it had, in its existing condition, a latent or dormant value for particular purposes, it required some particular occasion or call to bring this out; but, when such occasion did arise, then the very fact which had lessened its immediate availability for other purposes, and relatively to other portions of the same property, caused it to exhibit an intrinsic value so far in excess of those lands as to make them cease to serve as any proper basis of comparison. It is no unusual circumstance for owners of lands, deemed almost valueless, to become men of immense fortunes, by reason of advancing civilization of modern wants carrying with them industries for which they are especially appropriated and adapted; and not only this, but it is frequently due to the situation of some particular spot upon those places, through which has been developed the fact of its intrinsic value.

Section 1482 of the revised statutes declares that 'in estimating the value of the property to be expropriated, the basis of assessment shall be the true value of the land, before the contemplated improvement was

proposed, and without deducting therefrom any amount for the contemplated improvement.' Lewis, Em. Dom. 478, referring to the general principles bearing upon the subject of estimating values, says: 'In estimating the value of property taken for public use, it is the market value of the property which is to be considered. The market value of property is the price which it will bring when it is offered for sale, by one who desires, but is not obliged to sell it, and bought by one who is under no necessity of having it. In estimating its value, all the capabilities of the property, and all the uses to which it may be applied, or for which it is adapted, are to be considered, and not merely the condition it is in at the time, and the use to which it is then applied by the owner.' Also (sec. 479), 'the market value of property includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into account in estimating the compensation. Some of the authorities hold that its value for a particular use may be proved, but the proper inquiry is, what is its market value, in view of any use to which it may be applied, and of all the uses to which it is adapted?'

The Louisiana Supreme Court then quotes extensively, with approval, from the opinion of this Court in *Boom Co. v. Patterson*, and then continues, as follows:

"So it is proper to show that property possesses a peculiar value for railroad pur-

poses, for market gardening, for raising cranberries, for warehouse purposes, or for a bridge site."

Quoting still further from Lewis, the learned Supreme Court of Louisiana continues:

"Lewis (Sec. 501) referring to the enhancement in value, caused by the work or improvement says: 'Whatever the time fixed upon, with reference to which the compensation shall be estimated, the owner is entitled to the actual value of the land at that time, even though it may have been enhanced, by reason of the projected improvement, for which it may be taken. This is not really making the condemning party pay for an enhancement caused by its own work. Such enhancement does not come from the mere projection of the work, but from the existence of circumstances which create a demand for the work, and render it probable that such a work will sooner or later be built. It is not proper, however, to consider what the property would have been worth, if it could have had the benefit of the proposed improvement, without being taken.'"

Concerning the question of there being any necessity of any prior demand for the use of the property, for the particular purpose, the Supreme Court of Louisiana very clearly showed that whether there had been or had not been any prior demand, was wholly immaterial.

On this point, the learned Supreme Court says (p. 1619):

"If actual call or demand for purchase for a particular piece of property should be

taken as the test of its true value, the doctrine, when followed up to its logical conclusion, would, we think, result, in this case, in plaintiffs obtaining this land for nothing; for we question very much whether, during the long ownership of it by the defendant, it has received a single bid for it, or whether it will have another one, unless in the far future.

We are not called on to attempt any definition of the word 'value' or to say of what elements it is composed; but we think that while present active demand affects value, it is not of its essence, and that there is such a thing as an absolute intrinsic value to property, independent of offers to purchase, and that value includes in it at all times the possibilities of the future. We think that the purpose of the lawmakers, in enacting section 1482 of the revised statutes, was to prevent the owners of property, on which a contemplated public improvement was about to be made, from availing themselves of the increased value, which would be given to that property, by the making of the improvement,—in other words, that a railroad company (if the contemplated improvement was to be a railroad) 'should not (in the language of the last section quoted from Lewis) be made to pay for its own work'—and not that the owners of said property should be deprived of the right to avail themselves of the special adaptability of their land, for railroad purposes.

It will not do in this case to say that any increase of value, assigned to this strip of land by our decree, over and above the value of the surrounding and adjacent lands, would be due to the building of this road. So far from the building of the road giving value to the land, it is the special condition, situation and value of the strip which is the

real *raison d'être* of the building of the road. There is great reason for doubt whether the road would be built at all, but for the existence of this strip, ready, prepared as it were, for a road bed. Whether the plaintiff company, when organized and operated, will prove a paying investment or not, remains to be seen; but certainly, in looking to the profits of a future road, to the promoters of this company, the small amount required for its construction, arising from the very fact of the existence of this road bed, entered unquestionably as an important factor in reaching a conclusion as to whether the road would be an assured success."

The learned Court further said (p. 620) :

"It is difficult to deal with this matter of value by exact testimony, which of itself, when brought to its last analysis, is, after all, very much a matter of simple opinion. In considering the subject, courts and juries are forced as was said in *Rogan v. Railway Co. (Mont.)*, 52 Pac. 207-208, to exercise and rest upon 'good sense and sound discretion'."

See, to the same effect,

Galesburg & St. Eastern Rd. Co. v.

Milroy, 181 Ills. 243, at p. 247;

Calumet River Ry. Co. v. Moore, 124 Ills. 329, p. 334;

Muskeget Island Club v. Nantucket, 185 Mass. 303-305-306;

Fosgate v. Hudson, 178 Mass. 225, p. 232;

Fales v. Easthampton, 162 Mass. 422, at pp. 425, 426;

West Virginia R. R. Co. v. Gibson,
 94 Ky. 234, pp. 236-237;
Louisville, New Orleans & Texas
R. R. Co. v. Ryan, 64 Miss. 399;
Mississippi River Bridge Co. v. Ring,
 58 Mo. 491, p. 496;
Low v. Railroad, 63 New Hampshire,
 557, 562, and cases there cited;
Muller v. Railway Co., 83 Cal. 240;
St. Louis Terminal Rd. Co. v. Heiger,
 139 Mo. 315;
Hooker v. Railroad Co., 62 Vt. 47-49;
Chicago, Kansas & Neb. Railway Co.
v. Davidson, 49 Kans. 589;
King v. The Turnbull Real Estate
Co., 8 Canada Exchequer, 163;
Wilson v. Equitable Gas Co., 152 Pa.
 St. 566, p. 569;
Montana Railway Co. v. Warren, 6
 Mont. 275.
 See, particularly, the notes to *Smith*
v. Commonwealth, in *Annotated*
Cases, 1912 C, at pp. 1238, 1239,
 1240.

In the notes to the last mentioned case, numer-
 ous cases are cited, holding that the adaptability
 of land for particular purposes, must be taken into
 consideration, in estimating its value.

POINT VIII.

Chandler-Dunbar Co. v. The United States, 229 U. S. 53, Boston Chamber of Commerce v. The City of Boston, 217 U. S. 189, McGovern vs. The City of New York, 229 U. S. 363, and the Minnesota Rate Cases, 230 U. S. 352, do not apply to the facts in the case at bar.

Chandler-Dunbar Co. v. The United States, is clearly distinguishable from the case at bar, and the principle of law there enunciated does not apply to the facts at bar.

In the *Chandler-Dunbar Co.*, 229 U. S. 253, the United States Government was acquiring, under eminent domain, a part of the upland of St. Mary's River. St. Mary's River is a navigable stream. The Chandler-Dunbar Co. owned the part of the upland sought to be acquired by the United States, in fee simple, and had the usual right of a riparian owner to utilize the water power or falls in the river, in front of its land, subject to the absolute paramount right of the United States Government to control the river, and the falls, for the general purposes of navigation.

The Chandler-Dunbar Co., at the time of the condemnation proceedings, was using the water power, derived from these falls, under a revocable license from the United States Government.

The first question that arose before this Court in that case was the nature of the right which the Chandler-Dunbar Co., as an owner of the upland,

had in the use of the falls, or of the water in the St. Mary's River. It was held by this Court (p. 74) that the Chandler-Dunbar Co. practically had no right to the use of these falls, which amounted to property, inasmuch as the United States Government, under its power of controlling navigable rivers for the purposes of interstate commerce, had the paramount right at any time, to utilize all of the power in these falls, for the benefit of the general public, and that, consequently, it could not be said that a riparian owner had any beneficial interest in the use of these waters. This Court said, at pages 73-74:

"It is at best not clear how the Chandler-Dunbar Co. can be heard to object to the selling of any excess of water power, which may result from the construction of such controlling or remedial works as shall be found advisable for the improvement of navigation, inasmuch as it had no property right in the river which has been 'taken.' It has therefore, no interest whether the government permit the excess of power to go to waste, or made the means of producing some return upon the great expenditure."

This Court, however, did not weaken or overrule the doctrine of the *Boom Co.* case. On the contrary, this Court says, further on in its opinion in the *Chandler-Dunbar* case, *supra*, at page 77:

"Although it is not proper to estimate land condemned for public purposes, by the public necessities, or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose. *Lewis on Eminent Domain*, § 707; *Boom Co. v. Patterson*, 98

U. S. 403, 408; *Schoemaker v. U. S.*, 147 U. S. 242; *Alloway v. Nashville*, 88 Tennessee, 510; *Sargent v. Merrimac*, 196 Mass. 171."

The case at bar is, also, clearly distinguishable from the *Boston Chamber of Commerce v. The City of Boston*, 217 U. S. 189.

In the last mentioned case, the City of Boston was condemning a private right of way, which had long been used as a public way, in the same manner as if it had been a public street. The City of Boston desired to acquire the fee simple to this private right of way, and to open it up as, and to declare it to be, a public street. An easement over this private right of way existed, in favor of the owner's grantor and its successors. The existence of this easement made this private right of way of comparatively little value. If this easement had not existed, and if this private right of way had been unencumbered property, it would have been of considerable value. After the condemnation proceedings had been commenced, and while they were pending, the owners of the dominant and servient properties, and other persons having some interest in the lands in question, entered into a written stipulation to extinguish the easement, so that the land might be valued by the jury which was estimating the value of the land, as if the private right of way were free and clear.

The lower Court held that this could not be done, and that the City of Boston should only be required to pay for this private right of way what it was fairly and reasonably worth in the market, as its title then stood at the time when the City of Boston sought to condemn it.

Since, at that time, this private right of way was

not free and clear, but was subject to an easement which greatly depreciated its market value, the City should not be compelled to pay more than its value at that time, as the title then stood.

This decision followed the well-settled law set forth in 15 Cyc., pages 711 *et seq.*, as follows:

"Where real estate, taken for a street, is already subject to an easement, requiring the owner to keep open a private way having all the characteristics of a public street, as where, for example, he has plotted it, and sold lots with reference to the streets shown on the plot, the measure of damages to the owner of the fee is not the full value of the property, but its value, subject to the easement, the general rule being that the damages are nominal. So, the holder of the fee in a street which has not been opened is not entitled to substantial, but only to nominal compensation on its being opened, where it has been previously dedicated as a street."

In the *Boston Chamber of Commerce v. Boston*, *supra*, it appears from the report of the Hon. Robert R. Bishop, the learned trial judge, before whom the case was tried, that the Boston Chamber of Commerce owned in fee, certain property situated on India Street, upon which there was a private way, known as "Central Wharf Street," which was afterwards laid out as an extension of Milk Street. The Boston Chamber of Commerce had erected a building on its property. This property had been conveyed to the Boston Chamber of Commerce by the Central Wharf & Wet Dock Corporation, by a deed, containing a reservation to the grantor, its successors and assigns, of all rights of way, light and air, over that part of the premises which was known as the private way. This private way, which

constituted an easement on the premises in favor of the grantor, and its successors, had, for a long while, been used as a public street by the public generally. It was this private right of way which had been used as a public street, and which was subject to the easement that was being condemned.

The case at bar is entirely different in all respects. In the case at bar, the defendant in error is not asking the court to value his land, on account of any change in title. There is no easement on his land. The defendant in error's contention is that as his land stood at the time the City acquired his title, it had some element of value over and above its market value for agricultural and similar purposes, by reason of the fact that it is part of a natural reservoir site, for which prior demands existed in the open market, long before the City of New York sought to acquire it, demands which necessarily enhanced its market value.

The case of *McGovern vs. The City of New York*, has absolutely no application to the facts in the case at bar. The only question decided by this Court in the *McGovern* case was that this Court did not have jurisdiction to review the final decisions of the courts of the State of New York, on the ground that McGovern had been deprived of his property without due process of law. This Court there said (p. 370):

"When property is taken by eminent domain, it equally is recognized that there must be something more than an ordinary honest mistake of law in the proceedings for compensation, before a party can make out that the State has deprived him of his property unconstitutionally."

This Court further says (p. 373) :

"We are satisfied, on all the authorities, that whether we should have agreed or disagreed with the commissioners, if we had been valuing the land, there was no such disregard of plain rights by the courts of New York as to warrant our treating their decision, made without prejudice, in due form, and after full hearing, as a denial by the state of due process of law."

As a matter of fact, in the *McGovern* case, Section 12, of Chapter 724, of the Laws of 1905, of the State of New York, expressly provides that the commissioners of appraisal

"shall hear the proofs and allegations of any owner, lessee or other person in any way entitled to, or interested in said real estate, or any part or parcel thereof, and, also, such proofs and allegations as may be offered on behalf of the City of New York."

In the *McGovern* case, the commissioners of appraisal violated the statute, in that they positively refused to hear the proofs and allegations of the owner, notwithstanding the mandatory and explicit language of the statute. However, this Court held that such action on the part of the State Courts did not show disregard of McGovern's rights, and that even if he were right,

"it shows only that the commissioners and courts of New York adopted too narrow a view, upon a doubtful point, in the measure of damages. It hardly even is so strong as that; for the ruling of the commissioners is not to be taken as an abstract universal proposition, * * * ."

The only point necessarily involved in the *McGovern* case was the Federal question, and the only point really decided by this Court in that case was that McGovern had not been deprived of his property without due process of law, and that, consequently, this Court did not have jurisdiction.

The *Minnesota Rate cases*, 230 U. S. 352, have absolutely no application to the facts in the case at bar, and it is unnecessary to even refer to them.

POINT IX.

The fact that the defendant-in-error did not, or could not, alone use his property as a reservoir site, does not deprive the property of its value as a reservoir site, or a portion of a reservoir site.

In the *Boom Co.* case, this Court said:

"Property is not to be deemed worthless because the owner allows it to go to waste or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the interests or conveniences of life. Its capability of being made available gives it a market value which cannot be easily estimated."

This case was followed in *Great Falls Manufacturing Co. vs. United States*, 16 U. S. Ct. Claims, 160, the Court saying, pages 198, 199:

"Guided by the light of this authority, it is not difficult to reach a result in the present instance. The adaptability of the claim-

ant's land and of their water privileges to the purposes to which they have both been applied by the Government constitute a proper element to be taken into account in estimating their value. It is no answer to this view to say that the claimants could not have themselves made as advantageous use of this property. That objection is at once met by retorting that the Government could not have made as advantageous use of any other property of a like nature which was indispensable to the objects to be attained. The substitution of such other property would have involved the expenditure at the very lowest estimate of double the amount of the cost of the works as they have been located. It is not pretended that the damages of the claimant are to be measured solely by the savings of the Government; but such savings are not to be lost sight of in determining the value of the property."

(Aff'd. 112 U. S. 645.)

In *C. N. W. Railroad Co. vs. C. & E. Railroad Co.*, 112 Ill., at page 609, the Court said:

"In condemnation proceedings the owner of the property taken is not required to make any pecuniary sacrifices at all. He is entitled to whatever the property is worth to him, *or anyone else, for any purpose* to which it is adapted, but the special uses or purposes to which the property is adapted must be real—that is, founded on facts capable of proof,—and not merely speculative or imaginary."

In *Hooker vs. N. & W. R. R. Co.*, 62 Vt. 47, 48, 49, the Court said:

"Its market value depends not wholly upon the use to which the owner is putting it, but upon the use or uses for which it is

available at the time it was taken. If it is available for a marble or granite quarry, a coal or gold mine, or for building lots, rather than pastures, although not used for any of these purposes, or left unused by the owner, the use to which it may be put profitably, must of necessity enter into consideration in determining the market value of the premises."

To the same effect is a well-considered decision in an Arkansas case (*Railway Co. vs. Woodruff*, 49 Ark. 381, 5 S. W. 792), where the land was to be condemned for the location of a railroad bridge. The contention was that as the defendant had no right to bridge the Arkansas River while the plaintiff possessed such right, the defendant as owner could not have any damages based upon a use to which he could not put the property himself. The Court, however, refused to adopt this view, holding that the probable demand there may be for suburban property for depot and bridge sites is a recognized factor in the market value of such property.

In *Mississippi Bridge Co. vs. Ring*, 58 Mo. 491, the Court said:

"The correct rule to be applied relates to the value of the land to be appropriated which is to be assessed with reference to what it is worth for sale in view of the uses to which it may be put, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to have it."

POINT X.

The fact that the defendant-in-error was the owner of only a part of the reservoir site, does not prevent that element of value being considered. It only goes to the weight that should be given to the evidence, and the amount that should be allowed for this element of value.

In *San Diego Land and Town Co. vs. Neale*, 78 Cal. 63, the Court had under consideration a case on all fours with the case at bar, where land was being condemned by a private water company, for the purpose of obtaining an additional supply of water. The claimant's property was grazing or farm land in the Sweet Water Valley, and together with other lands owned by the Water Co., and other lands which the Water Co. was seeking to acquire, formed a natural reservoir site. The claimant's land, considered as agricultural or farming land was of nominal value. An award of \$280 per acre, for his land, however, was sustained by the highest court of California, the Court saying (78 Cal. 63, pp. 72-73) :

"While it is true that the defendants' property had no value for reservoir purposes except in connection with the land of the plaintiff, it is equally true that the plaintiff's property had comparatively little value for such purposes except in connection with the land of the defendants; the plaintiff's own evidence being that with the defendants' land included the reservoir will hold about six thousand million gallons and without the

land of the defendants it will hold only about one-tenth that quantity. And this being the case, we can see no more reason for saying that the plaintiff can take the defendants' portion without regard to its value for reservoir purposes than for saying that the defendants, if they had happened to commence proceedings first, could take the plaintiff's portion upon the same basis. The question of value is distinguished from the question of ownership." * * *

"Suppose, for illustration, that the two sides of a cañon suitable for reservoir purposes were owned respectively by two persons who are joined as defendants in a proceeding to condemn the land by a water company which did not own any of the property. It would not be pretended that such company could take the property at its value for grazing or agricultural purposes (which value might be nominal) *merely because it was owned by different persons. Such a proposition would be ridiculous.*"

In the *Ossalinski* case it was contended that the land of the Countess would not make a reservoir because it did not go all around the lake, and because parts of the land were scattered about. The Court said:

"No doubt that is perfectly true, but then, at the same time, it contributes to it, it is absolutely essential to a reservoir, and no reservoir could be made in those parts without taking her land, any more than a reservoir could be made on her land without taking the land of other persons in the neighborhood."

The reservoir was to be constructed at Thirlmere. And the Court further said:

"Under whatever circumstances Thirlmere might be turned into reservoir, it would be

absolutely necessary that the Countess Ossalinski's land should be taken, and it seems to me to be improper to deprive her of the benefit derived from that circumstance."

In re Arbitration between the Mayor, etc. of Tyne-mouth, and the Duke of Northumberland, 89 Law Times, 557, the Court said, at page 559:

"On the other hand some appreciation of the claimant's land undoubtedly flows from its situation being such as fits it for being of a higher value for reservoir purposes if taken in conjunction with other lands than it would have had if there were no such other lands for it to be taken with.

"It seems to me obvious that there must be some gain in value, and I cannot think it would possibly be right to say that the land of one of these claimants should be treated as if it had no reservoir value merely because apart from the other lands it would have none.

"You might just as well say that a complete reservoir site had no reservoir value because the owner of it did not own the land or the water course below the reservoir which is necessary for the flow of the waters to the places where the waters would be of utility. I cannot see any distinction between the two things."

In the *Boom* case, *supra*, there were several owners. In the *Gilroy* case, *supra*, there were five owners. If any distinction is to be made, based upon the number of owners of a piece of property, where will the courts draw the line? Will they hold that a piece of property, which is owned by five different people, is valuable, and the same property, owned by fifty different people, is valueless?

If such were the law, it would necessarily follow that if a single individual owned this entire

reservoir site, its desirability for water supply purposes and the existence of a demand for it for such purposes would be competent evidence, as an element entering into its market value; but, if the owner should by deed grant divided interests in the property to a large number of others, or if, he should die and by will devise many separate estates in it to others, this element of value would, *ipso facto*, disappear. It must appear from this illustration, that such a principle of law is unknown. Not only has it been urged and decided adversely to the City's contention in many cases above referred in this brief, but in the *Gilroy* case it was deemed unworthy of mention by the Court and neither the Appellate Division nor the Court of Appeals saw fit to even refer to it.

POINT XI.

The valuation placed by the Commissioners of Appraisal upon the land of the defendant-in-error, and confirmed by Judge Lacombe and the Circuit Court of Appeals, after a most careful consideration, is not the value of the land to the condemning party, but is the fair and reasonable market value of the land in the open market, taking into consideration, as an element of value, the adaptability of the land for water supply purposes.

As Judge Lacombe said :

"The evidence shows that the land in question, together with that of claimant's neigh-

bors, was available as a reservoir site, and that such availability was not confined to the uses of New York City. Apparently the award is not made on the basis of the value of the reservoir lands to the City of New York alone; had such been the basis the valuation would have been very much higher. But the Commissioners have taken into consideration as an element of value the circumstance that, had New York City never gone to this watershed, some other political community or some water company created by statute might have been willing to pay more than their value as farming land for the parcels which would enable it to impound water there. Under *Boom Co. v. Patterson*, 98 U. S. 403, this was a proper method of determining value."

Counsel for the plaintiff-in-error tried this case before the Commissioners of Appraisal, upon the theory that the defendant-in-error was entitled to this element of value in his property, as is shown by the fact that they made no objection to all of the evidence which was introduced for this purpose.

The various witnesses, who testified in favor of the defendant-in-error on this subject, testified to the fair and reasonable market value of the property, taking into consideration all of its elements of value. Mr. Vermeule placed the market value of this property on May 22nd, 1909, at \$57,836. He arrived at this valuation by first valuing the Ashokan Reservoir basin as a whole for reservoir purposes, by making a comparison between the cost of obtaining water of equally good quality with the Esopus water, with equally good pressure from this source and from four other available sources (p. 189, fols. 565-566).

This valuation is based upon the saving to the

City of New York, by taking the Ashokan Reservoir site in preference to the four next cheapest and available ones (p. 189, fols. 566-568).

The details of this valuation are contained in the testimony of the witness on pages 189-192 inclusive, and it is demonstrated that the intrinsic value of this reservoir site is about 34 million dollars, or about \$3,400 per acre, allowing for 10,000 acres, and excluding the marginal land (p. 192, fol. 576).

The witness regarded 40 per cent. of this intrinsic valuation or \$1,360 per acre as the market value per acre of this property for an average depth of reservoir of 36.2 feet, and allowing for the part of the property which would be covered by water, found that the overflowed lands had a market value of about \$1,088 per acre, and the marginal lands about \$300 per acre (p. 193, fols. 578-579).

The witness testified that this was not the value of the property to the City of New York, but its market value between a willing buyer and a willing seller (pp. 193-194-195).

The witness testified (p. 194, fols. 581-582) that the value which he placed upon the property was based practically on a saving to the City of 34 million dollars, by taking this site, in preference to the next cheapest ones (p. 194, fols. 581-582).

The use of this site, by which 34 million dollars is saved to the City of New York, gives to each part of this site an inherent element of value to at least a proportion of these savings (p. 194, fols. 581-582).

This enterprise will be profitable to the City of New York. The City is building it, and proposes to operate it as a business venture, the same as a private water company would, and to make a con-

siderable profit out of the transaction (p. 195, fols. 583-586).

The ordinary result of such an operation is to make a profit (p. 195, fol. 585). Many cities are making large profits out of their water systems (p. 195, fols. 585-586).

The Croton system is decidedly profitable, and has paid for itself long since (p. 196, fols. 586-587).

Robert E. Horton, an able and experienced engineer, whose qualifications are contained in the record, testified that the fair and reasonable market value of this property at the time that the city took title, was about \$57,000, or a little more than \$650 per acre. In estimating this value, the witness used his own independent judgment. He used two methods of valuation, which are set forth in detail on pages 232 and 233 of the record. This witness, without objection, testified to the great demand for this water, showing that this demand had existed before the city took title, and gave his reasons for the valuation which he placed upon the property.

It furthermore appears from the Second Annual Report of the New York State Water Supply Commission, that the Burr-Hering-Freeman Commission was instructed, among other things, to ascertain and report to the proper authorities of the City of New York

"the future source of supply for the city, which shall be most available from the point of view of cost and quality of water, to meet the probable future conditions of the city, with the estimated cost of each, the probable yield of water from each and the length of time required to complete each, with gen-

eral plans and specification." (Pp. 395-396, fols. 1185-1187.)

"The studies and report of that commission submitted to the Hon. Robert Grier Monroe, November 30, 1903; the studies and report of the Merchants' Association of the City of New York; the report of the National Board of Fire Underwriters of the City of New York; the discussions of the question by the Chamber of Commerce; the Manufacturers' Association of Brooklyn, the City Club, the New York Board of Trade and Transportation and other public-spirited bodies; the attention paid to this matter by the public press and on the forum and the profound interest manifested in legislation affecting the sources of the city's water supply; all these testify to its importance and interest. The value of an adequate supply of pure and wholesome water for New York City with its intimate connection with the people of every State in the nation cannot be overestimated. It is impossible to fully comprehend the disastrous results of a water famine in New York affecting as it would every home and business therein.

The testimony given at the hearing showing the near approach of the City of New York to a water famine in case of two or three consecutive dry years—and the dire results which would inevitably follow such a catastrophe, demand the execution of a plan to increase without delay New York City's water supply. The evidence of the engineers of the Board of Water Supply makes it clear that, with the growing consumption of water in New York City, the present water supply is wholly inadequate to the city's future needs. This condition subjects the city to grave danger, and therefore it is the imperative duty of the City's officials to act promptly.

Conscious, therefore, of the gravity of the situation which confronts New York City, of

the vast amount of money involved in the stupendous enterprise suggested, and with a full appreciation of the responsibility placed upon the commission of either granting or refusing the application of the City of New York, the Commission entered upon the discharge of its duties in the consideration of this application" (pp. 396-397, fols. 1186-1190).

The application referred to is the one to take the Ashokan Reservoir site. It appears further from the report of the said State Commission (p. 399, fol. 1196) :

"It is thus seen that all the available sources of water within easy reach of the City of New York are nearly exhausted, and each Borough is in immediate need of an additional supply."

Then follow the reasons why the property which the city has now almost completed taking, is the best, cheapest and most available property, suitable for the purpose.

The State Board of Water Supply was directed by statute to determine three things:

(1) Whether the proposed plans were justified by public necessity.

(2) Whether such plans were just and equitable to other parts of the State affected thereby.

(3) Whether the said plans made were fair and equitable provisions for the payment of all damages to persons and property direct and indirect (p. 397, fols. 1190-1191).

To properly determine the first proposition required consideration of New York City's popula-

tion, and an estimate of its increase; definite knowledge of the existing sources of water supply for the city, a careful study of the available yield of the proposed watershed, together with the quality of its water; a just comparison of its merits in these respects with all other watersheds; an estimate of the necessary time to put the plan into operation, and the probable cost thereof (pp. 397-398, fols. 1191-1193).

The State Water Supply Board found that the population of New York City in 1907 was about 4,013,000 (p. 398, fols. 1192-1193). They found that this population was increasing at the rate of about 3% per year (being about 120,000 people per year), which under the then existing conditions, meant an annual increase in the consumption of water of about fifteen million gallons per day (p. 398, fols. 1192-1193).

They found that all the available sources of water within easy reach of the city were nearly exhausted (p. 399, fol. 1196). They found that the Ashokan Reservoir site was capable of a storage capacity of 170 billion gallons of water, and that in conjunction with the tributary watersheds, was capable of storing enough water to afford a daily yield of at least 500 million gallons of pure and wholesome water (pp. 399-400, fols. 1197-1200).

They found that another strong argument in favor of this reservoir site was that the water can be delivered by gravity without the additional cost of maintaining a pumping plant (p. 400, fol. 1200).

They found that this mountain region in which this reservoir site is located, is not liable ever to become a manufacturing district or a center of a large resident population "and is therefore

peculiarly adapted for a permanent watershed" (p. 400, fols. 1200-1201).

They then showed that all of the other proposed watersheds were not nearly as good, as available, or adaptable as the Ashokan. The commission therefore found that the proposed plan to take this reservoir site was justified by public necessity (p. 404, fols. 1212-1213).

This commission, therefore, found (p. 407, fols. 1221-1222) :

"There are other municipalities embraced within the watersheds of the Esopus, Rondout and Catskill creeks and their tributaries which are now taking waters from said watersheds for the purpose of supplying their inhabitants with water for the usual municipal purposes, and the plans should be modified so as to protect and conserve the rights of those municipalities."

They also decided (p. 412, fols. 1234-1235) :

"That any Municipal Corporation or other civil division of the State within the watersheds of the Esopus, Rondout or Catskill creeks, may at any time take water from any reservoir or aqueduct to be constructed under said plans, upon paying to the City of New York a water tax or charge founded upon the quantity of water consumed, which tax or charge may be agreed between the parties or shall be fixed by the State Water Supply Commission after hearing all the parties interested."

Commissioner Chadwick testified that there was left no locality, except the Catskill Mountain region, without going to an expense which seems prohibitive, or without doing what was inadvisable for various reasons, where there could be found a

large supply of pure and wholesome water which could be secured with comparatively little injury to any one, and at an expense, while great, yet not beyond the power of the city to bear (p. 49, fols. 147-148).

The Adirondack supply is prohibitive on account of the enormous cost, and a supply from the upper Hudson for the same, as well as for other reasons, including the impure conditions of the water, the necessity of building filtration plants and compensatory reservoirs to keep up the flow of the water, and for other reasons (pp. 49-50, fols. 147-149).

Commissioner Chadwick further testified (p. 50, fols. 149-150) that the location of the Ashokan Reservoir site, from a topographical point of view, is a fine one, by reason of the fact that it is only necessary to construct an aqueduct from the Esopus Creek to the Croton watershed and build a dam at the Esopus Creek; that the Ashokan Reservoir site is practically a natural pond.

He further testified that at Olive Bridge on the Esopus Creek, there is the best dam site in any watershed (p. 52, fols. 155, 156).

When this reservoir is completed, and it is now nearing completion, the City of Kingston, the City of Yonkers, and the whole of Westchester County will have the right to obtain water from it (p. 53, fols. 159-160).

There has been a great scarcity of water in certain parts of Westchester County, and also in Connecticut (p. 54, fols. 160-161). The City expects to sell the water to the various inhabitants in Westchester County and in the towns which it supplies.

Mr. J. Waldo Smith, the City's chief engineer,

testified that the city expects to spend 177 million dollars in the construction of this work, which, when completed, will deliver 500 million gallons per day to the city (pp. 59-60, fols. 177-180). It will cost about 14 million dollars to do all the construction work to complete the Ashokan Reservoir (p. 70, fols. 209-210). It costs eight million dollars alone to build the small Kensico Reservoir (p. 63, fols. 189-190), which has a storage capacity of only thirty billion gallons, in comparison to a storage capacity of 170 billion gallons in the Ashokan reservoir site.

There is no other reservoir site, either in the Esopus or in the Schoharie, but the Ashokan reservoir site, which would be sufficiently large to store the waters of the Esopus and Schoharie watersheds (p. 69, fols. 205-206).

The Esopus watershed, of which the Ashokan reservoir site is a part, will furnish almost double the water than that which the city can get from the Schoharie watershed (p. 71, fol. 212). For water supply purposes, the Schoharie watershed is not so easily developed for New York City, as the Esopus watershed (p. 72, fol. 214).

Mr. Smith testified that they proposed to get water as cheaply as they possible could. "That was our business; would not live up to our duty if we didn't do that" (p. 72, fols. 215-216).

The city officials and their engineers made an estimate of the probable cost to be paid for the fifteen thousand acres contained in the Ashokan reservoir site, including the relocation of railroads and riparian damages, at \$520 per acre (p. 74, fols. 222-223).

The City of New York did not put on the stand a single witness, nor did it introduce a particle of

evidence to show that this property did not have an enhanced valuation, on account of its being a part of this valuable reservoir site.

There is no question about the law in the case at bar, because, in the case at bar, evidence showing previous demands for this site and for this water on the part of the City of New York, and on the part of other municipalities, is undisputed and uncontradicted, and the Commissioners of Appraisal followed the law as laid down by the United States Supreme Court, and by the State Courts.

The case at bar falls within both decisions.

It is clear, under all of the authorities, that the valuation which the Commissioners of Appraisal placed upon this property, was not its valuation to the City of New York, but was merely what they considered to be the fair and reasonable market value of the property, taking into consideration as an element in its value, the fact that it is adaptable and available to a certain special and profitable use, which the city is now making of it.

As the learned Circuit Court of Appeals says:

"That the Ashokan site is peculiarly suitable for reservoir purposes cannot be disputed. Indeed, it may almost be said that it is the only available location for a reservoir from which the great City of New York can be supplied with an abundance of pure water. Located, as the City is, on a narrow peninsula, between two tidal rivers, it is evident that the choice of sites which the State can control is an exceedingly limited one. A glance at the map seems to demonstrate the proposition that the supply of water for such an immense number of people must come from a reservoir located west of the Hudson and above the New Jersey line. The Ashokan site cannot escape the attention of a competent engineer em-

ployed to make the selection. The process of exclusion would inevitably bring him to the Esopus watershed. Its availability for furnishing New York with pure water was appreciated fourteen years ago, when the Ramapo Company was organized for the purpose of selling the water in question, not only to the City of New York, but to other cities of the State located on both banks of the Hudson. The availability of the Ashokan site induced the City of Kingston to make a careful examination of its capacity for furnishing a supply of water to that city. In short, without entering further into details, it can hardly be disputed that the Ashokan site was the natural place for the reservoir which is to supply the fast increasing multitude of people who dwell on both sides of the Hudson and that this availability has been proved, and was publicly known long before the City of New York instituted these proceedings. It must have been evident to all intelligent land owners that their property would, in the near future, inevitably be acquired as part of an immense water system. That this demand increased the value of these lands follows as a necessary conclusion. To value them only according to the tons of hay or the bushels of potatoes they produce, ignores the other elements of value, namely, that their possession was necessary in order that water might be furnished to the increasing millions along the banks of the Hudson."

In Cyc., Vol. 16, p. 1135, in one of the footnotes, it is said:

"An instruction that 'the best evidence of market value is the price paid for land in that neighborhood, making allowance for difference in position and improvements,' is properly refused; the true test being the

opinion of the witnesses in view of location, productiveness, and general selling price in the vicinity. *Pittsburg, etc., R. Co. v. Rose*, 74 Pa. St. 362. See also *East Pennsylvania R. Co. v. Hiester*, 40 Pa. St. 53."

Again, on page 1136:

"(E) Price Paid. It has been held that taken alone, the price paid for land furnishes no evidence of value even when the *bona fides* of the transaction is shown, and in no case is such a test conclusive. In connection with other evidence, however, it may have a logical bearing."

POINT XII.

The Federal Courts will not accept the decisions of a State Court as binding upon them on questions of general law.

Myrick v. Michigan Central R. R. Co.,
107 U. S. 102, 109.

Smith vs. Alabama, 124 U. S. 465,
478.

Bucher v. Railroad Co., 125 U. S. 555.

Liverpool and G. W. Steam Co. v.

Phenix Ins. Co., 129 U. S. 397, 443.

In *Independent School Dist. v. Rew*, 111 Fed 1, at page 10, it is said:

"Counsel for plaintiff-in-error have invoked the conceded rule that the national courts uniformly follow the construction of the constitution and statutes of a state

adopted by its highest judicial tribunal in all cases that involve any question of general or commercial law and no question of right under the constitution and laws of the nation (*Madden v. Lancaster Co.*, 65 Fed. 188, 192; 12 C. C. A. 566, 573; 27 U. S. App. 528, 535, 536); have cited the opinions of the Supreme Court of Iowa in *Holloway v. Hildebrandt*, 97 Ia. 177, 66 N. W. 89; *Independent Dist. of Rock Rapids v. Society for Savings*, 98 Ia. 581, 67 N. W. 370; *First National Bank of Decorah v. Doon Dist. Tp.*, 86 Ia. 330, 53 N. W. 301, 41 Am. St. Rep. 489; *Mosher v. School Dist.*, 44 Ia. 122; *McPherson v. Foster*, 43 Ia. 48, 22 Am. Rep. 215; and *French v. City of Burlington*, 42 Ia. 614—some of which are not in accord with the views which have now been expressed, and have claimed that the question here at issue is one of constitutional construction, and that the federal court should follow the decisions of the Supreme Court of Iowa. But the question that has been under consideration here is not one of the construction of the constitution or of the statutes of the State of Iowa. It simply involves the construction and effect of recitals in negotiable instruments. It is a question of commercial, and not of constitutional, law, upon which the decisions of the state courts are not controlling in federal tribunals. It is not only the privilege, but the duty of the federal courts imposed upon them by the constitution and statutes of the United States, to consider for themselves and to form their independent opinions and decisions upon questions of commercial or general law presented in cases in which they have jurisdiction, and it is a duty which they cannot justly renounce or disregard. Jurisdiction of such cases was conferred upon them for the

express purpose of securing their independent opinions upon questions arising in the litigation remitted to them, and a citizen of the United States who has the right to prosecute his suit in the national courts has also the right to the opinions and decisions of those courts upon every crucial question of general or commercial law or of right under the constitution or statutes of the nation which he presents."

Many authorities are cited in the opinion from which the above quotation is taken, including opinions of the United States Supreme Court, to the same effect.

See also:

Beard v. Independent Dist. of Pella City, 88 Fed. 375.

Columbia Ave. Sav. Fund, Safe Deposit & Trust Co. v. Dawson, 130 Fed. 152.

In the case last cited at page 177, the following conclusion was reached:

"(3) That this court is under no obligation to follow the decisions of the highest court of the state rendered after the contract in question had been entered into and the rights of the complainant and those it represents had been acquired thereunder; and that the decisions of the state courts prior to the execution of the contract were not so long and so firmly established as to constitute a rule of property, and that this court will decide independently whether there is a contract, and whether its obligation has been impaired."

See also:

Union Bank v. Board of Commissioners of Oxford, 90 Fed. 7.

Brunswick Terminal Co. v. National Bank of Baltimore, 88 Fed. 607.

Hunt v. Hurd, 98 Fed. 683.

Western Union Tel. Co. v. Sklar, 126 Fed. 295.

Manship v. New South Building & Loan Assn., 110 Fed. 845.

In re Hull, 115 Fed. 858.

Jones v. Southern Pac. Co., 144 Fed. 973.

The only question to determine under this point of our brief is whether the question of the value of real estate involves any question of statutory construction or the title to or interest in property. It is clear that it does not. In the case at bar, after the City of New York had divested the defendant-in-error of the legal title to his property, it became his debtor to the extent of the amount of the fair and reasonable market value of the property at the time of the taking. The defendant-in-error had a valid claim against the City of New York. The only question involved was what was the amount of his claim. The amount of his claim depended upon the fair and reasonable market value of his property at the time the City divested him of his title. In other words, the question involved is one of general law, that is, of the valuation of real estate. There are no statutes declaring just how real estate should be valued, at least there are none in the State of New York so far as counsel knows. Property is valued according to general laws. As the United States Supreme Court said in *Boon Co. v. Patterson*, 98 U. S. 403, at page 408:

"So many and varied are the circumstances to be taken into account in determin-

ing the value of property condemned for public purposes that it is perhaps impossible to formulate a rule to govern its appraisal in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general rule, we should say that the compensation to the owner is to be estimated by reference to the uses to which the property is suitable, having regard to the existing business or wants of the community, or such as may reasonably be expected in the immediate future."

Again, in *Wetmore v. Rymer*, 169 U. S. 115, 128:

"It is well known that there is no matter in respect to which the judgment of men vary more widely than in regard to the value of real estate. * * * It is unnecessary to quote authorities to show that in estimating the market value of land everything that gives it intrinsic value is a proper element for consideration; not only its present use, but its capabilities are to be considered."

"Value is in its nature so vague and indefinite that no human scrutiny can seize all its constituent parts, and, therefore, opinions of value are admissible in evidence from the necessity of the case."

Town of Rochester v. Town of Chester, 3 N. H. 349, 358.

It is apparent here that the question of comity does not arise, as there is no conflict between the state courts and the Federal Courts; but if there be any conflict, the decisions of the United States Supreme Court are controlling, as the question involved is one of general law.

POINT XIII.

The evidence, from one end of the record to the other, in this case, shows that the demand for this property for reservoir purposes, increased its market value.

Counsel for the City state on their brief that the Ramapo Company was not organized for the purpose of taking or selling water from the Esopus Creek at a'l.

The testimony in this case shows (p. 84, fols. 251-252) that the Ramapo Company contemplated acquiring the Ashokan Reservoir site, and that with that end in view, had filed maps, made surveys of portions of the site, and eventually would have filed maps of every portion of the site. They contemplated acquiring the site (p. 84, fols. 251-252).

The City's chief engineer, Mr. J. Waldo Smith, testified that the Ramapo Water Co. was organized (p. 83, fols. 247-248)

"on the hope of being able to sell water to the City of New York."

The Ramapo Company was formed to supply water to municipalities (p. 84, fol. 250), and had made a formal application to supply water to Brooklyn, and had informally applied to supply water to New York City (p. 84, fol. 251).

In the course of acquiring lands, which composed the Ashokan Reservoir site, Mr. Nostrand, who subsequently acted as the chief engineer for the Ramapo Company (p. 83, fol. 249), went to Ulster

County, in the line of his duty, to personally buy the lands which formed a part of this site, at as cheap a price as he could obtain them for (pp. 84-85, fols. 252-254).

For a number of years, extending from about 1895 to about 1900, he made contracts with certain owners on the site of this reservoir, at controlling points, for the purchase of land, and paid down on these contracts the first payments. Some of these contracts were renewed and extended upon further payments for several years (p. 85, fols. 253-254).

About the year 1899, a large number of contracts (probably 50 to 60 contracts) were made in this section (p. 85, fols. 254-255).

The owners of the lands which had been acquired, and of the other lands which the Ramapo Water Co. contemplated acquiring, knew that they were to be used for reservoir purposes (p. 85, fols. 254-255).

This naturally had an effect on the prices of the land (p. 85, fols. 254-255).

When it became known throughout that section that these lands were being purchased for reservoir purposes, the price of the remaining land went up to some extent, and contracts were mostly made within a few days, so as to prevent the rise in value (p. 85, fols. 255-256).

It was well known throughout that section of Ulster County that there was a demand for these lands for reservoir purposes (p. 87, fols. 256-257).

Another m's-statement of fact, contained on the brief of the City's counsel is, that the Sage property is (p. 35 of counsel's brief) not even in the Esopus watershed.

The Sage property being the property, the valuation of which is here in dispute, has been condemned

by the City as a part of the Ashokan reservoir site, which lies in the very heart of the Esopus watershed.

This misstatement of fact has been made by the City's counsel before both of the lower courts, and in each instance has been overruled by them. If the Sage property were not in the Ashokan reservoir site, it would not have been condemned in this proceeding, and would not have been before the courts.

Under "POINT II" of their brief, counsel for the City state to this Court that the honorable Circuit Court of Appeals did not have before it the record of Parcel 271-A, and that they did not compare what the Court in its opinion, 130 App. Div. 356, had said, as to the testimony of C. C. Vermeule, one of the defendant-in-error's experts in this case, with the testimony of the same witness in the Sage case.

This statement is not correct.

A casual inspection of the testimony of Mr. Vermeule, given in this case, will show that he testified, not to the value of the property to the City of New York, but to its market value between a willing seller and a willing buyer (pp. 193-194-195).

In the State Courts, they held that the questions asked of Mr. Vermeule directed him to testify to the value of the property in that case to the City of New York.

Moreover, the City's counsel, upon the trial of this case before the commissioners of appraisal, made no objections whatsoever to the testimony of any of the witnesses, and, consequently, cannot raise any such question on appeal.

If this Court passes upon the merits of the case

at bar, it may not be inappropriate to suggest to the Court that its opinion will have a great and far-reaching effect on millions of persons throughout the entire country. There are, throughout the west and south today, thousands of people who own interests in large reservoir sites, which are coming into the market, for irrigation purposes, and for other new uses which were heretofore unknown or unheard of.

It is, of course, supererogation to call the Court's attention to the fact, that the market value of property should not depend upon, whether it is taken by the public, or by private corporations. If the market value exists, a public corporation should be required to pay as much for the property, as a private one.

Before closing, it may be said that there is no proof in the record that there was

“a legion of owners, with different titles,” as stated by the City's counsel on page 27 of their brief.

The fact that the engineers for the City divided this whole section up into many hundred parcels of land, on maps, furnishes no such evidence.

On the contrary, it appears from the record (p. 400, fols. 1200-1201) in the various proceedings which were taken before the State Water Supply Commission, when the City was seeking to obtain permission from the State to acquire this reservoir site, that

“this mountain region is not liable ever to become a manufacturing district, or the center of a large resident population, and is, therefore, peculiarly adapted for a permanent watershed.”

POINT XIV.

For the reasons above given, or for any of them, the order of the United States Circuit Court of Appeals should be affirmed.

Respectfully submitted,

EDWARD A. ALEXANDER,
Attorney for Defendant in Error.

EDWARD A. ALEXANDER,
Of Counsel.

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Supreme Court of the United States,

OCTOBER TERM, 1914. No. 307.

IN THE MATTER

OF

The Petition of THE CITY OF NEW YORK
for a writ of certiorari to the United
States Circuit Court of Appeals for
the Second Circuit in the case therein
entitled :

IN THE MATTER

OF

The Application and Petition of JOHN
A. BENSEL, CHARLES N. CHADWICK
and CHARLES A. SHAW, constituting
the Board of Water Supply of The
City of New York, to acquire real es-
tate for and on behalf of The City of
New York, under chapter 724 of the
Laws of 1905, and the acts amenda-
tory thereof, in the Town of Hurley,
Ulster County, New York, for the
purpose of providing an additional
supply of pure and wholesome water
for the use of The City of New York.

THE CITY OF NEW YORK,
Plaintiff in Error,

AGAINST

WILLIAM SAGE, JR.,
Defendant in Error.

BRIEF FOR PETITIONER.

This case is before the court on a writ of *certio-
rari* directed to the United States Circuit Court

of Appeals, Second Circuit, to review the proceedings in that court which resulted in the entry of a final judgment awarding to the owner of a parcel of land of 86 and a fraction acres taken by The City of New York under the right of eminent domain *"the sum of \$4,324.45 for reservoir availability and adaptability."*

Since 1906 The City of New York has been constructing in the foothills of the Catskill Mountains an immense reservoir, having a storage capacity of approximately 127 billion gallons of water (fol. 211), commonly known as the Ashokan Reservoir.

As stated by the New York Court of Appeals in a recent case, the Ashokan Reservoir

"will occupy a territory about fourteen
"miles in length and about two miles in
"width and will contain 15,221 acres of land.
"It includes a strip of land about 1,000 feet
"in width around what will be the exterior
"water line of the reservoir when filled. To
"make this vast reservoir possible it has been
"necessary to acquire by purchase or con-
"demnation not only such vast area of land,
"but several hundred dwellings and build-
"ings, including shops, stores, mills, schools
"and churches which were standing thereon.
"It has resulted in removing from said ter-
"ritory about 2,000 inhabitants who were
"living in the seven villages and the scat-
"tered habitations within its boundaries and
"all the established and other businesses
"which were theretofore conducted thereon."

*(Matter of Board of Water Supply,
211 N. Y., 174.)*

The Courts of the State of New York held as to two other parcels taken for the Ashokan Reservoir

where increased value was claimed by reason of adaptability for reservoir purposes that:

"It is only when it is shown that it has a "market value for some particular use that "the availability and adaptability of the "property to the use can be taken into consideration by the Commissioners in determining its fair market value" (130 App. Div., 350; *affd.*, 195 N. Y., 573).

And

"The question, therefore, is not whether "the property is particularly adaptable for "the special use, but whether purchasers can "be found who would pay more for it because of its adaptability to the use" (130 App. Div., 356; *affd.*, 195 N. Y., 573).

The judgment of the State Court in the latter case was affirmed by this Court in *McGovern vs. The City of New York*, 229 U. S., 363.

The United States Circuit Court of Appeals on essentially the same evidence, admitted and afterwards stricken out in the case reported in 130 App. Div., 356, and rejected in the first instance in the case reported in 130 App. Div., 350, says in its opinion as to the parcel now before the Court:

"There is in the present case evidence that "the Ashokan site had long been known and "its availability as a great reservoir recognized by experts and business men and efforts to acquire it had from time to time "been made. If the State courts had passed "upon the identical question presented by "the evidence in the case at bar, we might "feel constrained, in the absence of a controlling authority of the Supreme Court, to "follow their decision, but for the reasons "just stated, we cannot find that they have

"passed upon the precise question involved in the cases relied on by the plaintiff in error. In these circumstances we deem it our duty to follow the case of Boom Company vs. Patterson, 98 U. S., 403, which holds, in substance, that the value of the land in question is increased because of its availability as a reservoir site."

Statement.

The proceeding in which the property involved in this case was acquired was instituted in the Supreme Court of the State of New York pursuant to chapter 724 of the Laws of 1905 of that State and the acts amendatory thereof, for the purpose of acquiring real estate to construct a reservoir to secure an additional supply of pure water.

The statute provides for the filing, in each county in which any of the real estate is located, of maps upon which should be laid out and numbered the various parcels of real estate to be taken, and for the application, after such filing, to the Court upon six weeks' notice, for the appointment of Commissioners of Appraisal. The notice consists of public signs on the property and extensive newspaper advertising (sec. 8).

Owing to the great area to be taken for the Ashokan Reservoir, over 15,000 acres, and the great number of separate and distinct parcels comprising the same, over 1,140, it was divided as permitted by the statute (sec. 5), into sections and application for the appointment of Commissioners of Appraisal was made for the respective sections from time to time. The map of the first section was filed in Ulster County, January 31, 1907, and those of the other sections, from 2 to 14 inclusive, at different

dates, between that time and March 4, 1909 when the map of section 15, which embraces Parcel 733, was filed in Ulster County. Six weeks prior to May 22, 1909, public notice was given that on that date application would be made for the appointment of Commissioners of Appraisal for section 15. At the time of the filing of the map and the publication of the notice of the application for the appointment of Commissioners of Appraisal, the record owner of Parcel 733 was Solomon T. De Lee, a citizen of the State of New York. In consideration of the sum of \$4,500 (fol. 1031), De Lee conveyed the property to William Sage, Jr., the defendant in error herein, on May 17, 1909, five days prior to the date noticed for the hearing in court of the application for the appointment of Commissioners of Appraisal.

On the 22d day of May, 1909, the application was granted and the Commissioners appointed by the Court took, subscribed and filed their oaths of office in the office of the Clerk of the County of Ulster, on the 27th day of May, 1909, and certified copies in the office of the Clerk of the County of New York, on May 28, 1909. Section 11 of the Act expressly provides that upon the filing of the oaths as aforesaid, the City of New York shall become seized in fee of the parcels described in the petition.

On the 29th day of April, 1910, upon the petition of William Sage, Jr. (fol. 25), setting forth that he was a citizen of New Jersey and the owner in fee of Parcel No. 733, an order was issued by the Supreme Court of the State of New York removing the proceeding as to that parcel to the United States Circuit Court (fol. 43).

On October 31, 1910, the owner made a motion in the United States Circuit Court for an order ap-

pointing Commissioners of Appraisal (fol. 49) and, on November 4, 1910, the City of New York made a motion for an order remanding the proceeding to the Supreme Court of the State of New York (fol. 73).

Circuit Court Judge Noyes denied the motion to remand and also the motion for the appointment of new Commissioners (fol. 98), holding that the removal of the proceeding from the State Court included the order appointing Commissioners of Appraisal.

The case came on for trial before the Commissioners and there was offered in evidence a deed dated August 3, 1907 conveying the property to Frank Burhans, a deed dated August 24, 1908 in which Frank Burhans and wife conveyed the same property to Solomon T. DeLee, and a deed dated May 17, 1909 in which DeLee conveyed the property to William Sage, Jr., the defendant in error (fol. 105), the purchase price being \$4,500 (fol. 1031).

On behalf of claimant the following real estate witnesses were called:

John H. Sacks testified that he was familiar with Parcel No. 733 and had been for fifteen years; that he lived about a quarter of a mile from it (fol. 285). That he had examined it for the purpose of estimating and testifying to its fair and reasonable market value (fol. 293). That its market value, exclusive of quarry and reservoir value, was \$12,000 (fol. 295). On cross-examination he was asked:

"Q. What is this amount that you have given of \$12,000?

"A. I think this is the fair market value of this farm.

"Q. What it would bring if it were in the market?

"A. Yes, sir" (fol. 306).

John B. Van Kleeck testified that he lived in Shokan; that he examined Parcel 733 for the purpose of testifying to its fair and reasonable market value (fol. 321); that its fair and reasonable market value was \$12,000 (fol. 322), exclusive of quarry and reservoir value; that he is not an expert on any of those subjects (fol. 323).

On cross-examination he was asked:

"Q. What is this \$12,000. you testified to?

"A. That is the value of this Parcel 733.

"Chairman: In its entirety?

"The Witness: Yes, sir.

"Q. Is that the fair market value at the time the City took title?

"A. Yes, sir.

"Q. What is fair market value?

"A. I consider it the value of a willing seller and a willing buyer" (fol. 342).

Elmer Molineaux testified that the fair market value of the property was \$13,500 (fol. 348), and subsequently added "exclusive of reservoir." On cross-examination he was asked (fol. 353):

"Q. Mr. Molineaux, you stated that you had valued this land at \$13,500 exclusive of reservoir value?

"A. Yes, sir.

"Q. Did you say that?

"A. I did.

"Q. How did you know that?

"A. I heard them say so; I know nothing about that.

"Q. At any rate you did not value it for reservoir purposes?

"A. I did not.

"Q. The reason that you made that statement was because you heard some talk about reservoir purposes, you say?

"A. Yes, sir."

William Haven testified that a fair and reasonable value of the property, exclusive of any element of reservoir or quarry value, was \$12,500 (fol. 365).

Edwin Burnhans testified that prior to four years ago he lived at Brown's Station in a house overlooking the Ashokan Reservoir site (fol. 402); that he had bought and sold property in the immediate vicinity of this property (fol. 409); that its fair market value, exclusive of reservoir element and quarry value, was \$14,113; that he was not competent to testify to the reservoir element of value (fol. 410).

On cross-examination he was asked:

"Q. What is this price that you have testified to, this amount?

"A. The value of the farm.

"Q. Is that the fair market value of the property at the time the City took title?

"A. I would say so" (fol. 442).

On his redirect-examination (fol. 451) he was asked:

"Q. A great deal of other property was condemned by The City of New York from time to time in condemning the Ashokan site, was it not?

"A. Yes, sir.

"Q. The whole of the Ashokan Reservoir site was divided into territorial sections, was it not?

"A. They were.

"Q. And they were numbered from one to eighteen consecutively, were they not?

"A. Yes.

"Q. And each one of these Commissioners had to pass upon the value of the property and damages for the rights taken within its territorial section, did it not?

"A. They were appointed for that purpose, yes.

"Q. And as The City of New York first acquired one section of this land and then another, did the balance of the reservoir site increase or decrease in market value?

"A. Well, it certainly should have increased.

"Q. Do you know as a matter of fact which way it went?

"A. We did not consider it in making our valuation—did not consider that. But there is no question but what the last parcel was worth a great deal more than the first.

"Q. Was that on account of the awards that were made by the Commissioners who were first appointed?

"A. On account of that and also on account of all around there, on the outskirts of the reservoir the property advanced 200 per cent. more in price.

"Q. After The City of New York had acquired title to the first section of this property the owners who owned the balance of this reservoir site knew that their property was taken for reservoir purposes, did they not?

"A. They did.

"Q. And held it at a higher price, did they not?

"A. Yes, Sir."

Walter Lee testified only as to the value of the quarry (fol. 480).

Virgil H. Winchell testified that he was familiar with farms and their values throughout the Asho-

kan Reservoir section; that he had bought and sold some property there (fol. 489); that he did not know anything whatever about valuation for reservoir purposes and valued the property solely for farm purposes exclusive of the value of the quarry (fol. 492) at \$12,000. (fol. 493).

On cross-examination he testified as follows:

"Q. Is that \$12,000 in your opinion the fair market value?

"A. Yes, sir.

"Q. At the time the City acquired title?

"A. Yes, sir.

"Q. What do you mean by fair market value?

"A. What the property is worth between a willing buyer and a willing seller" (fol. 504).

In addition to the above witnesses claimant called three engineers, Cornelius C. Vermeule of East Orange, N. J.; Robert E. Horton of Albany, N. Y., and Peter E. Nostrand of Brooklyn, N. Y.

Mr. Vermeule placed the market value of the parcel at \$57,836 (fol. 564). He testified that he arrived at this valuation by first valuing the Ashokan Reservoir Basin as a whole for reservoir purposes, by making a comparison between the cost of obtaining water from four other available sources (fol. 565). This valuation is based upon the saving to The City of New York by taking the Ashokan reservoir site in preference to four next cheapest available ones (fol. 565). By this method of valuation he fixed the intrinsic value of the whole ten thousand submerged acres of the reservoir site as \$34,000,000 (fol. 576), and the proportionate value of the eighty-six acres embraced in parcel 733 at \$57,836 (fol. 577).

On his direct-examination he testified:

"Q. These figures are the savings to the
"City of New York?

"A. Yes."

"Q. And you think that the Ashokan
"Reservoir site, by the use of which this
"34 million dollars is saved The City of
"New York, has an inherent element of
"value and is entitled to be valued, to at
"least a proportion of these savings?

"A. Yes, a reasonable part of the intrinsic value.

"Q. And assuming the fair and reasonable value of this property as between a
"willing buyer and a willing seller, and that
"percentage of saving and an element of
"value which any man who understood his
"business in valuing this property would
"and should take into consideration?

"A. Inevitably, certainly.

"Q. And if he didn't take it into consideration he could not place a correct value
"as to the fair and reasonable market value
"of this property?

"A. No, he could not" (fols. 581-582).

On cross-examination he testified:

"Q. This amount that you have testified
"to as the fair market value of parcel 733
"is the value of the land embraced in that
"parcel used in connection with the rest of
"the reservoir site?

"A. Yes, practically" (fol. 678).

Mr. Horton testified that the value of the parcel 733 was \$57,083.40 (fol. 693). He said he used two methods in arriving at his value. By the first he says he took the average of awards that had been made by Commissioners for other parcels which he assumed was their value for agricultural

or residential purposes, which gave him \$330 an acre (fol. 695), and that he was of the opinion that such lands would be worth twice that amount for reservoir purposes, using his own language—

“Multiplying \$330 by two gave me \$660
“per acre, which is the figure I finally used”
“(fol. 696).

His second method he testified consisted

“in determining how much a private corporation or individual, having a market for
“the water which could be supplied from
“this drainage basin at a fair rate or at a
“rate less than it would cost the City, could
“afford to pay for these lands for reservoir
“purposes and, at the same time, do business at a reasonable and substantial profit”
(fol. 697).

On cross-examination he testified:

“I didn’t attempt to determine the value
“of this particular parcel and my method
“does not require it” (fol. 771).

and further on stated:

“I don’t consider myself a real estate expert in that locality” (fol. 780).

Mr. Nostrand values the parcel at \$58,726 (fol. 788); he arrived at this valuation by taking a statement made by Commissioner Chadwick as to the profit which would be made from an enterprise of this character and the estimate of Chief Engineer Smith of the Board of Water Supply of The City of New York as to the cost of the Ashokan reservoir, and figured out what he considered the proportionate part that should be attributed to

parecl 733 (fols. 788-796). The following appears in his direct examination (fol. 797) :

"Q. In other words that is the basis of the "theory that The City of New York is saving the large amount of money by using "this site in preference to any other site?

"A. Yes.

"Q. By saving this money it makes the "entire profit as a business enterprise?

"A. Yes.

"Q. And a part of these profits is contributory to this reservoir site which forms "the basis of the entire enterprise?

"A. Yes.

"Q. In this business enterprise it is necessary to have this reservoir site?

"A. Yes.

"Q. It is also necessary to have the necessary labor and materials to build a reservoir and the aqueducts and other appurtenances?

"A. Yes.

"Q. You know the actual cost of the labor and materials that go into the construction work?

"A. Yes.

"Q. And we know according to Commissioner Chadwick what the net profits per annum would be?

"A. Yes.

"Q. And you have simply figured up the proportionate part that should fairly be attributed to this land?

"A. I have."

The claimant also offered in evidence certain proceedings in 1893-6 of the Common Council of the City of Kingston, New York, and its committees relative to obtaining a source of water supply from Bishop Falls and Esopus Creek (fol. 1255). The City of Kingston rejected this proposed plan and

purchased the then existing water works of the Kingston Water Company (fol. 1394).

Claimant also offered in evidence the record of contracts made to purchase lands of the Ramapo Company in 1899 (fol. 240), which contracts, however, were permitted by that company to lapse (fol. 228).

It was stipulated and agreed that the present claimant paid \$4,500 in cash as the purchase price of Parcel No. 733 (fol. 1031).

For The City of New York three witnesses testified that the value of the parcel was \$5,500 (fols. 972, 1035 and 1085, respectively), of which \$2,845 was for the buildings, and one witness who testified that the quarry had no value (fol. 890).

The Commission made an award of "The sum of \$7,624.45 for land and buildings and the further sum of \$4,324.45 for reservoir availability and adaptability being a grand total of the sum of \$11,948.90" (fol. 1424), and recommended that claimant be allowed 5 per cent. of the award for legal fees and expenses (fol. 1425), and the further sum of \$1,372.31 for witnesses (fol. 1426).

The City moved to confirm the report as to the land and buildings only and not for reservoir availability, witness fees and counsel fees (fol. 1438) and claimant moved to set aside the report *in toto* (fol. 1429). The report was confirmed as made by the Commissioners by Judge Lacombe (fol. 1449).

The City of New York sued out a writ of error to the Circuit Court of Appeals for the Second Circuit claiming that the Court had erred in the following respects:

I.—That the Court erred in removing this proceeding from the State Court to the United States Court.

II.—That the Court erred in holding that there was evidence before the Commissioners of Appraisal of any value for reservoir availability and adaptability except to the condemning party, The City of New York.

III.—That the Court and the Commission erred in holding that the claimant is entitled to compensation, both for reservoir availability and adaptability, and for the value of the farm buildings and quarry; and that these two values are contradictory and that the claimant is not entitled to the sum of contradictory values.

IV.—That the award is grossly excessive.

V.—That in arriving at their award the Commissioners of Appraisal proceeded on an erroneous theory.

VI.—That the award of the Commissioners of Appraisal in the Catskill Water Supply proceedings cannot be confirmed until a motion for confirmation is duly made, and that no motion for the confirmation of that part of the award as to reservoir availability and adaptability was made by either party.

VII.—That the claimant in this proceeding took the property subject to the rule as laid down by the highest court of the State of New York, and that it was error to make an award in disregard of that rule.

VIII.—That the only question before the Court was whether the report should be rejected *in toto*

or the land and building value confirmed and the rest of the report rejected and that the Court erred in confirming the whole report.

IX.—That the Court erred in holding that the rule laid down in *Boom Co. vs. Patterson*, 98 U. S., 403, applied to this parcel in this proceeding, and was the proper method of determining value, and that if said rule did apply, the Commissioners of Appraisal herein erred in that they did not follow it.

The case came on for hearing on November 14, 1912, before Coxe and Ward, Circuit Judges, and Holt, District Judge.

The opinion of the Court was delivered by Coxe, J., July 15, 1913, affirming the judgment of the lower court. The opinion of the Court states that its decision was withheld pending the decision of this Court in *McGovern vs. The City of New York*. The petition for rehearing was presented (p. 528) and denied without opinion.

The City of New York presented a petition to this court December 6, 1913, for a writ of *certiorari* to review the judgment of the United States Circuit Court of Appeals on the following grounds:

(1) The Circuit Court of Appeals erred in refusing to remand this case back to the Supreme Court of the State of New York.

(2) Both the Circuit Court of Appeals and the Circuit Court for the Southern District of New York upheld the additional award for reservoir availability and adaptability on the authority of *Boom Co. vs. Patterson*, 98 U. S., 403. That case is not applicable to the one at bar,

(a) because the property of 86 acres here involved had no adaptability of itself for reservoir purposes, and was only made adaptable by The City of New York by combining it with thousands of other acres, and at an expense of \$18,000,000 for dams and dikes,

(b) because its so-called reservoir value is simply its proportionate share of an estimate of the value of the entire reservoir site, comprising thousands of parcels with different titles, as a whole contrary to the principle laid down by this Court in *Boston Chamber of Commerce vs. the City of Boston*, 217 U. S., 189.

(c) The Circuit Court of Appeals has assumed that because years ago sites on the Esopus River had been considered by the City of Kingston and the Ramapo Water Company for the location of reservoirs that those sites were the site selected by The City of New York for the Ashokan Reservoir, which is not the fact.

(d) The Testimony shows that only about half of the Ashokan Reservoir would be needed to store all the water that can be obtained from the Esopus River and that parcel 733 here under consideration was not needed for such purpose.

(e) That in the *Boom Company* case the value for availability and adaptability was added to the land value, while in this case the reservoir and availability value was added to the value of the land plus the value of the farm house, barn and other buildings on the land, the value of the land and buildings as found by the Commission exceeding the reservoir availability value. In this manner the claimant received the sum total of two con-

tradictory values, the farm house and buildings obviously adding nothing to the reservoir value, but being a detriment.

(3) The decision of the Circuit Court of Appeals conflicts with the decision of the courts of the State of New York, 130 App. Div., 350, 356; affirmed 195 N. Y., 573, holding that it is only when availability and adaptability for reservoir purposes has actually influenced the price for which property could be sold in the market, that its use for that purpose can be taken into consideration by Commissioners of Appraisal in fixing its market value, which decision was affirmed by this Court in the *McGovern case*, 229 U. S., 67.

(4) If the decision of the Circuit Court of Appeals is permitted to be final under which increased awards can be obtained in the Federal Courts, the decision of this Court in the *McGovern case*, 229 U. S., will in effect be nullified, for the reason that the title to all parcels to be taken in the future by The City of New York for reservoir purposes will be transferred to citizens of other States after the filing of the maps and public notices, if the return of the petition is, as the Circuit Court of Appeals holds, the beginning of the proceeding, and the cases will be removed from the State to the Federal Court.

(5) The plans of The City of New York for its water supply take in four water sheds, the Esopus River and its tributaries, the Rondout River and its tributaries, the Catskill Creek and its tributaries and the Schoharie Creek and its tributaries, with reservoirs located in each (Rec., fols. 1197, 1198). The land thus far taken has been

for the reservoir on the Esopus Water Shed only, although part of the water to be stored in that reservoir is to be brought from the Schoharie Water Shed by a tunnel through the mountain and stored and delivered through the Ashokan Reservoir (fol. 198). In carrying out its plans it will be necessary for The City of New York to take thousands of other parcels for the construction of the "two reservoirs on the main Rondout Creek, Lackawack and Napanoch, four small reservoirs on the Rondout below the Napanoch" (Rec., fol. 199) and also for the Prattsville Reservoir on the Schoharie, and it is of the utmost importance that the question here involved should be passed upon by this Court.

The petition for the writ was granted by this court and the return thereto was filed January 27, 1914.

POINTS.

I.

The Circuit Court of Appeals erred in holding this case within the principle laid down in *Boom Co. vs. Patterson*, 98 U. S., 403.

Boston Chamber of Commerce vs. Boston, 217 U. S., 189.

U. S. vs. Chandler-Dunbar Co., 229 U. S., 53.

McGovern vs. The City of New York, 229 U. S., 363.

Minnesota Rate Cases, 230 U. S., 352.

The additional award for reservoir availability and adaptability was upheld by both the Circuit Court of Appeals and the lower court on the authority of the Boom Company case. This Court in that case held that Patterson, who owned some islands in the Mississippi River, about an eighth of a mile from its westerly bank, which when connected with the mainland would form a boom of immense capacity for holding logs, was entitled to have their availability for boom purposes considered as an element in estimating the value of his land.

This decision was based on the rule there laid down that in determining the value of land appropriated for public purposes, the proper inquiry was:

"What is the property worth in the market, viewed not merely with reference to the use to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses."

In other words, that case held that the inquiry as to the value in a condemnation proceeding is not to be restricted to a consideration of the use which is, in fact, made of the land, but to any other or profitable use to which it is adapted.

This rule, however, must be taken in connection with the well-settled rule that the value of the use to the condemning party is not the legal measure of damages.

To fall within the rule laid down in the Boom Company case the land must be of such character in itself or subject to such surrounding conditions as to be at once fairly and reasonably available for such other or more profitable use, and such use

must be one that can be availed of by its owner or anyone similarly circumstanced as a physical or financial possibility. In other words, before such other use can be considered as an element of value, it must be shown that there is some special feature to the particular parcel taken, in its location or in the configuration of its surface or the character of the soil or the like, or in relation to surrounding conditions and present circumstances, whereby it could reasonably and with advantage be employed by the owner for some purpose other than that for which he was using it.

That the property may be adapted to such other or more profitable use in conjunction with other lands to be acquired by some gigantic corporation organized for the purpose, or by some great municipality, cannot be considered. It must be so available to the owner or any other individual under ordinary conditions; for the very reason and purpose of eminent domain is that aggregations of capital in the form of corporations may undertake and carry out great works for the public benefit which are not possible to individuals.

Furthermore the basis for a claim of additional compensation on account of adaptability and availability to proposed purposes is the theory that the property may thereby be made more profitable in the hands of the condemning party, and that by such taking the owner is deprived not only of his property as it stands, but also of some of the gains which will accrue by reason of its use for the purpose for which it is taken, which is in effect saying that the claim is for gains prevented.

It follows, therefore, that before such a claim can be sustained it must be established that had the property not been taken the owner could, and

in all probability would, either himself or in combination with others, have used the property in the same manner as the condemning party expects to use it and thus acquire the gains himself.

If the owner could not in any event make the same profitable use of the property as the condemning party, then it is manifest that no gains on his part have been prevented and there is no ground for his claim.

Where land in its existing state may be at once used and is presently available for the very purpose sought not only to the condemning party, but to the owner or any owner similarly circumstanced, the Courts have, in some exceptional cases, allowed increased compensation for such present special availability.

Such was the Boom case, the lands condemned were presently available for the purpose sought. The condemning party, which was a private corporation and seems to have had the right to acquire land by eminent domain, took the property for private business purposes. There was nothing to show that the owner had not the same right as well as ability to carry on the Boom business as had the petitioner, nor was there any reason why he could not do so.

But there is no authority holding that where the land, taken by itself or in conjunction with other lands to be acquired, may be made available and adaptable for a use by the expenditure of money or labor, and thus its existing form changed into something different, that enhanced damages can be given as increased value by reason of its general adaptability for the purpose for which it has been condemned.

To construct a reservoir to supply water for a

great city the primary requisites are land upon which to build the reservoir, water with which to fill it and an elevation sufficient to accomplish the delivery and distribution of the water. With the proper elevation the amount of land to be taken would depend upon the rainfall, the watershed and the amount of water that the catchment area would supply compared with the amount that it was desired to impound. These factors would determine the location of the dam and its height and the height of such dikes as would be necessary, so that the question as to whether any particular parcel of land would be required as part of the reservoir would depend, not only upon the physical conditions but upon the necessities of the condemning party. The parcel of land lying within the confines of the area necessary for the reservoir as determined by the physical conditions and the necessities of the condemnor may be said to be adaptable simply because it is land located where it is, but it has no special adaptability for particular use and can only be used in connection with the rest of the land within the site selected and by the expenditure of enormous sums of money for the erection of the dams and dikes. There was taken for the Ashokan Reservoir some 15,000 acres, or over 23 square miles of land. By expending \$18,000,000 for dams and dikes, the city makes the 15,000 acres a receptacle for holding water. This 15,000 acres of land was made up of farms and small holdings, business places, churches, schools, cemeteries, railroad stations and the roadbed of a railroad. Can it be said that each and every one of these holdings was adaptable for reservoir purposes and entitled to be so valued under the Boom Company decision? The absurdity of the claim that the owner of one of

these parcels himself or in combination with the others could utilize his property for reservoir purposes is well set forth by Betts, *J.*, in his opinion confirming the award made for parcel 83, section 3, Ashokan Reservoir (58 Misc., 581), where at page 596 he says:

“There will be in the land taken by the Ashokan reservoir, I am informed, about one thousand parcels of land. Many of these parcels have more than one owner, one before me has tight tenants in common. Many others of them have lienors, tenants and different interests connected with them which must be acquired by any persons desiring to create a reservoir there. There are easily an average of two persons interested in each of these parcels of land. In order to make this parcel eighty-five available as a reservoir the consent of these other owners or persons interested must be obtained. Many of these owners are persons under age or otherwise incompetent, and from the nature of things could not consent nor would anyone be authorized to consent for them with the owner of parcel No. 85, that this whole section should be made into an immense reservoir. The tract—the whole proposed reservoir site—contains numerous cemeteries in which deceased persons have been interred. Such properties are inalienable, and no one could give consent to their forming part of a reservoir site. In addition there are many school-houses and churches, the owners and congregations of which it is reasonable to assume would embrace people residing outside of the reservoir district, whose consent would have to be obtained to the use of this property for a reservoir site and in some instances legislation would be necessary. There are miles of public highways in this section which requires statutory authority

"to close for the purpose of a reservoir site
 "and to close which would require the con-
 "sent of many people outside of the reservoir
 "district. Recollecting that there is no
 "water upon this parcel of land which is
 "available for filling such a reservoir as is
 "contemplated in the offer here, recourse
 "must be had to the Esopus Creek which
 "runs through this immense proposed reser-
 "voir site containing some 8,000 acres, and
 "from which stream and its tributaries the
 "water for filling this dam is expected to be
 "obtained, so even after having obtained the
 "consent of the riparian owners along this
 "Esopus Creek in the proposed reservoir sec-
 "tion for the construction of this reservoir,
 "there is still no water available to fill it.
 "'Running water in natural streams is not
 "property and never was' (*City of Syra-*
 "*cuse vs. Stacey*, 169 N. Y., 231-245).
 "Hence these riparian owners do not
 "own the water in the Esopus. *The*
 "*Esopus Creek empties into the Hud-*
 "*son River some twenty-five or thirty*
 "*miles below where the City of New York*
 "*proposes to erect its dam, or where if a*
 "*combination of the owners of land was*
 "*affected their dam would be erected.* Each
 "of the riparian owners on each side of that
 "twenty-five or thirty miles of stream has a
 "right to the use of this water in the way in
 "which it is now running and always has
 "run. So the consent of all of these riparian
 "owners would be necessary to construct a
 "similar dam or any kind of a dam which
 "would impound the large body of water
 "which is proposed to be impounded here.
 "Easily one thousand people and probably
 "many more would be interested in that
 "proposition. If their consent was obtained
 "and the dam constructed and the water
 "impounded still so large a body of water
 "is not successfully marketable by the glass,

"pail or car-load. There is only one market
 "for it and that is the City of New York,
 "some ninety odd miles distant. Assume
 "that the consent of all those parties owning
 "lands through which the proposed aque-
 "duct is to run could be obtained to the
 "construction of an aqueduct similar in its
 "nature to the one that is proposed to be
 "constructed by the City of New York,
 "another army of people must be consulted
 "with probably other infants and incompe-
 "tents who cannot consent so that many
 "hundreds of people more would be required
 "to give their consent to this proposed dam,
 "as about two hundred parcels are in the
 "Ulster County division of the Aqueduct.
 "The offer on the part of Elizabeth Hogan
 "does not contain any statement that she is
 "able, ready and willing to furnish the
 "millions of dollars required to erect this
 "dam and aqueduct, pay these riparian own-
 "ers and carry this water to New York, so
 "that something more than consent is nec-
 "essary. For these reasons among others
 "it seems to me that the attempt to show
 "that this great proposed reservoir and
 "aqueduct could have been constructed by
 "any possible combination open to the resi-
 "dents and land-owners there before the
 "condemnation by any suggested method
 "that has come to my attention seems en-
 "tirely the product of a fertile imagination,
 "or that (which is the true test) such a
 "proposed combination and construction or
 "the right to combine and construct could
 "have added in any way to the market value
 "of a farm, wood lot, residence or building
 "lot in Section No. 3, is altogether unlikely.
 "It seems fanciful and speculative in the ex-
 "treme. Nothing approaching it has been
 "called to my attention."

The just compensation guaranteed by the Con-
 stitution for property taken for public use is its

fair market value; that is, the price at which it could be sold as between an owner not unwilling to sell and a purchaser desirous, but not compelled, to buy. In the hands of a *legion of owners with different titles*, could 15,000 acres of land, properly speaking, have a market value?

The expression "just compensation" has reference not only to the amount which the owner is to receive, but to the amount which the condemning party has to pay, and is to be measured by the loss to the owner by the appropriation of his property. He is entitled to receive the full value of what he has been deprived of, no more; an award for less would be unjust to him, and an award for more would be unjust to the public. If, therefore, the condemning party is compelled to pay, in addition to what he can get for his property as between a willing buyer and a willing seller, an added value on the theory that the property taken in connection with the property of thousands of other owners and after the expenditure of vast sums of money, has a greater value for a specific purpose, it is manifest that the owner will receive more than just compensation,—that he will be paid for something which he never owned and, therefore, for something which was never taken from him.

The fact that the necessities of The City of New York made it necessary to construct a reservoir of sufficient capacity to furnish 386,000,000 gallons of water per day (fol. 206) is the only thing that made necessary the taking of many of the parcels of land acquired for the Ashokan Reservoir. Of these 386,000,000 gallons of water per day, however, only 250,000,000 gallons can be obtained from the Esopus Creek (fol. 198).

The plans of The City of New York contemplate

bringing 136,000,000 from the Schoharie watershed in Schoharie County by means of a tunnel through the mountains and storing and delivering it through the Ashokan Reservoir (fols. 198 and 206). Had the City constructed a reservoir to store only such water as can be obtained from the Esopus, it would have required a reservoir only a little more than half the size of the Ashokan Reservoir and parcel 733, the Sage parcel here under consideration, would not have been necessary for such purpose (fol. 608).

How then, under any circumstances, can it be said that the Sage parcel was adaptable for reservoir purposes when the water, which makes its taking necessary as a part of the reservoir, must be procured from another watershed at an additional expense of millions of dollars?

Furthermore, as parcel 733 now before this Court for consideration has no adaptability for a reservoir by itself and is simply one of more than a thousand parcels, with as many different titles, that go to make up the Ashokan Reservoir, it is not understood how it can be valued together with all the other parcels for reservoir purposes under the decision of this Court in *Boston Chamber of Commerce vs. City of Boston, supra*. That was a proceeding in the Massachusetts courts to assess damages caused by the laying out of a street where the Chamber of Commerce owned the fee of the land taken, the Central Wharf & Wet Dock Corporation owned an easement of way, light and air over the land in question and the Boston Five Cent Savings Bank held a mortgage on the land, subject to the easement. The three owners filed an agreement in the case that the damages might be assessed in a lump sum to which the City of Boston refused to

assent. It was agreed that, if the owners were right, the damages should be assessed at \$60,000, but that, if the City was right, they should be \$5,000. The judge before whom the case was tried ruled in favor of the City of Boston and this ruling was sustained by the Supreme Court of Massachusetts (195 Mass., 338). The case was brought to this Court on a writ of error to the Supreme Court of the State of Massachusetts.

The plaintiff in error claimed that the market value of the "locus" of the land taken for the street at the time of the taking was \$60,000, and that under the authority of *Boom vs. Patterson*, the owners in fee simple of the land unencumbered were entitled to recover that amount; that the right of the petitioners to recover the fair market value of the land was not lost because of the fact that there was more than one owner, nor by reason of the fact that the entire title was held by different owners, who owned different interests. This Court in its decision said:

"The Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unincumbered whole when it is not held as an unincumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained. We regard it as entirely plain that the petitioners were not entitled as a matter of law to have the damages estimated as if the land was the sole property of one owner."

The principle there laid down was applied by this Court in *U. S. vs. Chandler-Dunbar Co.*, *supra*,

where the Court said in disallowing an award for strategic value:

"This allowance has no solid basis upon which it may stand. That the property may have to the public a greater value than its fair market value affords no just criterion for estimating what the owner should receive. It is not proper to attribute to it any part of the value which might result from a consideration of its value as a necessary part of a comprehensive system of river improvement which should include the river and the upland upon the shore adjacent. The ownership is not the same. The principle applied *Boston Chamber of Commerce vs. Boston*, 217 U. S., 189, is applicable."

In the *Minnesota Rate Cases*, 230 U. S., 352, this Court, referring to an estimate of the value of the right of way of a railroad based on the cost of its reproduction and of the claim that the railroad company would have to pay more than its fair market value, said, at page 451:

"It is urged that, in this view, the company would be bound to pay the 'railway value' of the property. But supposing the railroad to be obliterated and the land to be held by others, the owner of each parcel would be entitled to receive on its condemnation, its fair market value for all its valuable uses and purposes. *United States vs. Chandler-Dunbar Water Power Company*, decided May 26, 1913; 229 U. S., 53. If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. *Mississippi, etc., Boom Company vs. Patterson*, 98 U. S., 403; *Shoemaker vs. United States*, 147 U. S., 282; *United States vs. Chandler-Dunbar*

"Company, supra. But still the inquiry "would be as to the fair market value of "the property; as to what the owner had lost "and not what the taker had gained. *Boston "Chamber of Commerce vs. Boston, 217 "U. S., 189, 195.*

"The owner would not be entitled to demand payment of the amount which the "property might be deemed worth to the "company; or of an enhanced value by "virtue of the purpose for which it was "taken; or an increase over its fair market "value, by reason of any added value "posed to result from its combination with "tracks acquired from others so as to make "it a part of continuous railroad right of "way held in one ownership. *United States "vs. Chandler-Dunbar Company, supra; "Chamber of Commerce vs. Boston, supra."*

In *McGovern vs. The City of New York, supra*, which involved an award made for another parcel making up the site taken for the Ashokan Reservoir, this Court said, at page 372:

"The plaintiff in error was entitled to be "paid only for what was taken from him as "the titles stood, and could not add to the "value by the hypothetical possibility of a "change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. *Boston Chamber of Commerce vs. Boston, 217 "U. S., 189, 195.* In estimating that probability the power of effecting the change by "eminent domain must be left out."

It would seem, therefore, that this decision brings the question of the allowance of the additional award for reservoir availability and adaptability squarely within the decision of the courts of the

State of New York (130 App. Div., 350-356, affirmed 195 N. Y., 573), holding that:

"It is only when it is shown that it has a "market value for some particular use, that "the availability and adaptability of property "to the use, can be taken into consideration "by the commissioners in determining its "fair market value" (130 App. Div., 350).

"The question, therefore, is not whether "the property is particularly adapted for the "special use, but whether purchasers can be "found who would pay more for it because "of its adaptability to the use" (130 App. Div., 356).

To uphold the award for reservoir availability and adaptability, therefore, under these decisions there must be evidence that its value had been increased in the market by reason of such adaptability.

II.

There is absolutely no evidence that the market value of Parcel 733 had been increased by reason of availability and adaptability for reservoir purposes.

If there had been a demand for this property for reservoir purposes, or for any other purpose, which had increased its value, that increase would necessarily be reflected in the value placed upon it by the real estate witnesses called by the claimant. These men who lived in the vicinity and who had known the property for years testified to its fair market value but stated that that value was "ex-

clusive of reservoir value." Their testimony, however, shows that this reservoir value which they had excluded was not anything that had affected the price at which the property could be sold as between an owner not unwilling to sell and a purchaser desiring to buy. It was something of which they, although claiming to know the market value of the property, knew nothing and as to which they stated they were not competent to testify. It is this value which the claimant undertook to prove by the three engineer witnesses. Although labelled "market value for reservoir purposes" the testimony of these witnesses shows that the amount testified to by them is simply the proportionate share to which the 86 acres of land in this parcel would be entitled of the entire valuation placed by them on the submerged 10,000 acres in the reservoir by fantastic speculations based on so-called (1) imaginary savings accruing to The City of New York by its using the Ashokan site in preference to some other (Vermeule). (2) The amount that a corporation or individual could pay for the entire Ashokan site and make money (Horton). (3) Imaginary profits that would be derived by The City of New York if it should sell all the water impounded in the Ashokan site at a certain price after deducting the cost of construction (Nostrand).

It is clear that this testimony was not offered for the purpose of proving that the value of the Sage parcel, No. 733, had been increased in the market, but on the theory advanced by the claimant in his brief in the court below, that as the parcel was to be used as part of the Ashokan site the owner was entitled, under the decision of this Court in the Boom case, to have it valued in connection with all the other parcels taken for the Ashokan Reservoir

as a whole for reservoir purposes regardless of the fact that it had never been considered up to the time of the condemnation proceedings for that use and, consequently, its availability for that use had not affected the market value. Aside from the vices with which all of this testimony is infected, it would seem sufficient here to say that its fundamental basis is the valuation of all the parcels comprising the reservoir site with their hundreds of different titles as a whole and that it is in violation of the rule of law laid down by this court in *Boston Chambers of Commerce vs. City of Boston, supra*.

This brings us to a consideration of the only other evidence in the case, the Ramapo maps and the proceedings of the Common Council of Kingston. The Circuit Court of Appeals in its opinion says:

"Its availability for furnishing New York
 "with pure water was appreciated fourteen
 "years ago, when the Ramapo Company *was*
 "*organized for the purpose of selling the*
 "*water in question*, not only to The City of
 "New York, but to other cities of the State,
 "located on both banks of the Hudson. The
 "availability of the Ashokan site induced
 "the City of Kingston to make a careful ex-
 "amination of its capacity for furnishing a
 "supply of water to that city."

In the first place, the Ramapo Company was not organized for the purpose of taking or selling water from the Esopus Creek, which is in Ulster County, New York, at all, but, as stated in paragraph 6 of its certificate of incorporation:

"The operations of the company are to be
 "carried on mainly in the Counties of Rock-
 "land and Orange, State of New York" (fol.
 1405).

In the next place, the fact that the Ramapo Company had considered the construction of several reservoirs of smaller capacity than the Ashokan reservoir in Ulster County (fol. 252) for the purpose of selling the water in question, *i. e.*, the water of the Esopus, and that the City of Kingston had considered one site at Bishop Falls, further up stream than the Ashokan Dam, and one at Winchell Falls, below the point where the Beaverkill Creek empties into the Esopus, which is nearly a mile below the Ashokan Dam (fol. 1265), cannot be said to have created a demand for parcel 733, because it would not have been included in those contemplated reservoirs. The Esopus Creek is 50 or 60 miles long. There are a number of reservoir sites at different points along the creek (fol. 680). Bishop Falls, the site approved by the Engineer of the City of Kingston for the location of its proposed reservoir (fol. 1273), and the proposed Ramapo Reservoir site were located on the Esopus Creek above the Ashokan Dam, while the Sage parcel No. 733 is located on the Beaverkill. The City of New York, as appears from the testimony and the map, is, in fact, constructing two distinct reservoirs, arranged so that either can supply the aqueduct. There is a dam enclosing the Esopus Creek and a dike enclosing the Beaverkill. Separate pipes connect these two portions of the reservoirs with the aqueduct.

The Sage farm is five miles away from the proposed Ramapo and Kingston sites and it is in a different watershed. No rain falling on the Sage farm would have flowed into the Ramapo or Kingston proposed reservoirs and merely to impound the water of the Esopus would not have required, as heretofore stated, a reservoir larger than the

western portion of the reservoir, which would have excluded the Sage parcel.

Again, the Ramapo and Kingston sites are at an elevation of only 500 feet, while the elevation of the Sage farm is 587 feet, so that besides being more than five miles away it is at a higher elevation and would have no value for reservoir purposes either to the Ramapo Company or the City of Kingston. Furthermore even if a demand, which was not reflected in the market price, for property to be used in connection with other property would entitle the owner to have his property valued in connection with such other property as a whole regardless of the conditions of the titles, and regardless of the fact that it could not be made adaptable except in connection with such other property and by the expenditure of immense sums of money in assembling the various elements together, nevertheless, so far as the Sage parcel is concerned, under no circumstances could such testimony bring it under the rule laid down in the Boon Company case, because it would not be needed for a reservoir which would store all the water that can be obtained from the Esopus Creek (fol. 609). Nor does any of the testimony which has been adduced in this case tend to show that the price at which the property could be sold in the market had been influenced by availability or adaptability for reservoir purposes.

The Circuit Court of Appeals also says in its opinion:

"We are not at all convinced that, with the
"question presented upon the testimony in
"this record, the State Courts would have de-
"cided as they did in the cases reported in
"130 App. Div., 350-356; affirmed, 195 N. Y.,
"573."

If the Honorable Circuit Court of Appeals had had before it the record of parcel 271-a or had even compared what the Court in its opinion, 130 App. Div., 356, had said as to the testimony of C. E. Vermeule, who was the leading expert and engineer for the claimant in that case, with the testimony of this same witness in the Sage case, where he was also the leading expert and engineer (fols. 564, 582), it would not have assumed that the State Courts had not passed upon the identical questions presented by the evidence at bar. In that case the Appellate Division said at page 357:

"The witness testified that the fair and reasonable market value of this parcel on the 22d day of July, 1907, when it was taken by the city, was \$99,280 and that in arriving at this estimate he considered the special adaptability of the reservoir site, of which the parcel is a part, and the special availability of it as compared with other possible sites, and secondly the reasonable value of water delivered to a city for city use and the cost of delivery."

"He also testified that the Ashokan Reservoir site was worth \$34,000,000 and that this valuation was based upon the capacity of the reservoir, the reasonable market price of the water when delivered at the furthest city in which it would be likely to be used and the cost of delivery; that the storage capacity of the property in question would be 76-100 of one per cent. of the whole capacity of the reservoir; that on that basis the intrinsic value of the property taken would be \$248,000 and the market value was 40 per cent. of that sum or \$99,280."

Comparing this with his testimony in the Sage case and his statement (fol. 575)

"I have taken these four valuations and averaged them, and the average of all for the Ashokan Reservoir Basin comes to \$34,193,200, which I take as the intrinsic value of that reservoir site; that, if it is spread over the entire 10,000 acres of reservoir site, would amount to an intrinsic value of \$3,400 per acre. I have taken for the market value spread over the entire site 40 per cent. of this or \$1,360 per acre for an average depth of reservoir of 36.2 feet,"

it will be seen that the theory of this witness is exactly the same in both cases. As the basic principle of the other two engineer witnesses for claimant in the Sage case was similar to that of this witness, namely, the valuation of the entire site taken by the City for the Ashokan Reservoir as a whole, it would seem that the State Courts did pass on the identical question presented by the evidence in the case at bar.

It was of this testimony that the courts of the State of New York held:

"It therefore appears that the opinion of the witness as to the value of the premises in question, was based upon its value in conjunction with the other parcels included in the reservoir site, upon the value of the reservoir, the feasibility and cost of conveying the water in pipes or an aqueduct to The City of New York, and the value of the water to the City.

"It is to be noted that this evidence did not tend to prove the present market value of the property or its value at the time it was taken, but its probable value after other property is acquired, and millions of dollars are expended in the construction of a reser-

"voir, which may and may not be built. It
 "was simply his opinion of the value based
 "upon the necessity of the land to the City
 "or what the City could afford to pay rather
 "than do without it" (130 App. Div., 356,
 aff'd 195 N. Y., 573).

III.

The State courts having held that there can be no recovery for reservoir availability and adaptability of parcels taken by the City of New York for the Ashokan Reservoir considered in connection with other parcels, the Federal court will accept those decisions as the law of the State of New York and as binding on it.

In *Boston Chamber of Commerce vs. City of Boston*, 217 U. S., 189, this Court said:

"This Court accepts the construction of
 "the State statute as to condemnation of
 "land given to it by the State Court."

In *Backus vs. Fourth Street Union Depot Company*, 169 U. S., 557:

"The settled rule of this Court in cases
 "for the determination of the amount of
 "damages to be paid for private property
 "condemned and taken for public use is that
 "it accepts the construction placed by the
 "Supreme Court of the State upon its own
 "constitution and statutes."

See also

Burgess vs. Seligman, 107 U. S., 20.

The just compensation guaranteed by the constitution to the owner whose property is taken for a public use has been held by both Federal and State Courts to mean its fair market value and market value of property depends on its location. Unless the Federal Courts accept the construction and decisions of the Courts of the State of New York, the value of Parcel No. 733, is made to depend not on its location, but on the residence of the owner and the mere transfer of the legal title just before it vested in the City of New York established a different rule of property valuation for that parcel. Thousands of other owners whose property was taken for the Ashokan Reservoir received awards for their property based upon the measure of "just compensation" adopted by the Courts of the State of New York and as the Supreme Court of the United States has held (*Marchant vs. Penn. R. R.*, 153 U. S., 380), that

"Where the plaintiff has the benefit of a
 "full and fair trial in the several courts of
 "his own State and where his rights are
 "measured not by laws made to affect him
 "individually, but by general provisions of
 "law applicable to all in like condition, even
 "if he can be regarded as deprived of his
 "property by the adverse result, the proceed-
 "ings that so resulted were in 'due process
 "of law' as that phrase is used in the Fifth
 "and Fourteenth Amendments of the Con-
 "stitution of the United States."

To hold therefore that a citizen of the State of New Jersey is entitled to a different valuation from that to which the citizens of the State of New York owning similar property are entitled, would be to give to one individual certain rights denied to

others, would be an unjust discrimination and a denial of the equal protection of the laws.

Furthermore, if the additional award for reservoir availability and adaptability be upheld by this Court it will establish the law that the rule of damages in the Federal Courts is not only different but more favorable to owners than that of the State Courts, with the inevitable result that the title to all parcels of land to be acquired for the other proposed reservoirs of The City of New York will be transferred to citizens of other States and the condemnation proceedings removed to the Federal Courts.

IV.

The Circuit Court of Appeals erred in holding that this was a controversy between citizens of different States removable from the State to the United States Court.

By the Constitution and laws of the United States, the jurisdiction of the federal courts on the ground of citizenship of the parties extend only to suits between citizens of different States, and in order to remove a case from a State court to the United States Court, that difference of citizenship must have existed at the time when the suit was begun as well as at the time of removal.

Section 416 of the New York Code of Civil Procedure provides:

"A civil action is commenced by the service of a summons,"

and Section 433 provides:

"The provisions of this article relating to
"the mode of service of a summons apply
"likewise to the service of any *process* or
"other paper whereby a *special proceeding*
"is commenced in a court or before an officer
"except where special provision for the serv-
"ice thereof is otherwise made by law."

It has been held that a condemnation case is a
special proceeding within the New York Code.

King vs. New York, 36 N. Y., 182.

Matter of Peterson, 94 App. Div., 143.

*Matter of Grade Crossing Commis-
sioners*, 17 App. Div., 54.

The question is what is the "process or other pa-
per" whereby this special proceeding was com-
menced? Chapter 724 of the Laws of 1905 of the
State of New York, under which this proceeding
was brought, provides for the making and filing by
The City of New York of maps upon which shall be
laid out and numbered the various parcels of real
estate to be taken. By section 7 it is provided:

"After the said map shall have been filed
" * * * the corporation counsel for and
"on behalf of The City of New York shall,
"upon first giving the notice required in the
"next section of this act, apply to the Su-
"preme Court * * * for the appointing
"of commissioners of appraisal * * *."

The next section provides:

"SEC. 8. The corporation counsel shall
"give notice in the City Record, and in two
"public newspapers published in The City
"of New York, and in two public news-
"papers published in each other county in

"which any real estate laid out on said maps
 "may be located, and which it is proposed
 "to acquire in the proceeding of his inten-
 "tion to make application to the said Court
 "for the appointment of commissioners of
 "appraisal, which notice shall specify the
 "time and place of such application, shall
 "briefly state the objects of the applications
 "and shall describe the real estate sought to
 "be taken or affected. A statement of the
 "boundaries of the dams, reservoirs, sluices,
 "culverts, canals, pumping works, bridges,
 "tunnels, blow-offs, filters and ventilating
 "shafts and of the route of the tunnels and
 "aqueducts by courses and distances and of
 "the greatest and least width of its track,
 "with separate enumerations of numbers of
 "the parcels to be taken in fee, and of the
 "numbers of parcels in which an easement
 "is to be acquired, with a reference to the
 "dates and places of filing the said maps
 "shall be sufficient description of the real
 "estate sought to be so taken or affected.
 "Such notice shall be so published contin-
 "uously in each issue of the newspapers for
 "six weeks immediately previous to the pres-
 "entation of such petition; and the corpo-
 "ration counsel shall in addition to the said
 "advertisement cause copies of the same in
 "hand bills to be posted up for the same
 "space of time, in at least twenty conspicu-
 "ous places on the line of the aqueduct or
 "in the vicinity of the real estate so to be
 "taken or affected."

Section 9 provides:

"At the time and place mentioned in said
 "notice * * * the court upon due proof
 "to its satisfaction of the publication and
 "posting aforesaid and upon filing the said
 "petition shall make an order for the ap-
 "pointment * * * of commissioners of
 "appraisal * * * "

This is a proceeding in *rem* and jurisdiction of the subject matter is acquired by the posting and publishing of the notice required by the statute of the intention of The City of New York to make application for the appointment of Commissioners of Appraisal, upon the filing of whose oaths title to the fee of the parcels on the map vests in The City of New York.

It would seem, therefore, that this posting and publishing is the process referred to in section 433 of the Code whereby this special proceeding is commenced, and as the map must be filed before this notice by posting and publication in newspapers or the process can be issued that the map is the paper referred to in section 3348 of the Code, which provides:

"Where a provision of this act is made applicable by the last section, to an action or
 "a special proceeding commenced on or after
 "a day herein specified, if, before that date,
 "a summons in an action, or a citation is
 "sued from a surrogate's court, has been
 "served upon one or more, but not upon all,
 "of the persons to be served; or an order for
 "the service of a summons as prescribed in
 "article second of title first of chapter fifth
 "of this act has been made; or, in a special
 "proceeding, elsewhere than in a surrogate's
 "court, the petition or *other paper*, upon
 "which the first order, process, or other man-
 "date may be made or issued, has not been
 "presented, the action or special proceeding
 "is not deemed to have been commenced
 "within the meaning of that section."

As Mr. Sage was not the owner of parcel 733 at the time of the commencement of the suit, the Federal Court was without jurisdiction and the case should have been remanded back to the State court.

V.

The judgment of the United States Circuit Court of Appeals should be reversed and the additional award for availability and adaptability for reservoir purposes disallowed.

Respectfully submitted,

FRANK L. POLK,
Attorney for Petitioner.

LOUIS C. WHITE,
WM. MCM. SPEER,
of Counsel.

THE facts, which involve the validity of an award by commissioners for land taken for the Ashokan reservoir in New York, are stated in the opinion.

Mr. Louis C. White and *Mr. W. McM. Speer* with whom *Mr. Frank L. Polk* was on the brief, for petitioner:

The Circuit Court of Appeals erred in holding this case within *Boom Co. v. Patterson*, 98 U. S. 403.

There is absolutely no evidence that the market value of the property taken had been increased by reason of availability and adaptability for reservoir purposes.

The state court having held that there can be no recovery for reservoir availability and adaptability of parcels taken by the City of New York for the Ashokan reservoir considered in connection with other parcels, the Federal court will accept those decisions as the law of the State of New York and as binding on it.

The Circuit Court of Appeals erred in holding that this was a controversy between citizens of different States removable from the State to the United States court.

The judgment of the United States Circuit Court of Appeals should be reversed and the additional award for availability and adaptability for reservoir purposes disallowed.

In support of these contentions see *Backus v. Fourth Street Depot*, 169 U. S. 557; *Boom Co. v. Patterson*, 98 U. S. 403; *Chamber of Commerce v. Boston*, 217 U. S. 189; 195 Massachusetts, 338; *Burgess v. Seligman*, 107 U. S. 20; *King v. New York*, 36 N. Y. 182; *Marchant v. Penna. R. R.*, 153 U. S. 380; *Matter of Grade Crossing*, 17 App. Div. 54; *Matter of Peterson*, 94 App. Div. 143; *Matter of Water Supply*, 211 N. Y. 174; *Matter of Simmons*, 58 Misc. (N. Y.) 581; 130 App. Div. 350; 195 N. Y. 573; *McGovern v. New York*, 229 U. S. 363; *Minnesota Rate Cases*, 230 U. S. 352; *Shoemaker v. United States*, 147 U. S. 282; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53.

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Argument for Respondent.

Mr. Edward A. Alexander for respondent:

It was not error to refuse to remand this proceeding to the state court.

The courts had no power to modify the award, without nullifying the state constitution.

The findings of the Commissioners of Appraisal were findings of fact, which an appellate court has not jurisdiction to review.

The Commissioners of Appraisal followed the decisions of the state court.

The adaptability of land for reservoir or water supply purposes has been uniformly taken into consideration, as an element, in estimating its value in a number of well-decided and carefully considered cases, both in the United States and Great Britain.

The lower courts were right in holding this case within the principle of *Boom Co. v. Patterson*, 98 U. S. 403.

Although there were prior demands, such are unnecessary to be proved, to entitle the owner to the element of value, due to the adaptability and availability of his property, as part of a natural reservoir site, and such value is not in any sense speculative. *Chandler-Dunbar Co. v. United States*, 229 U. S. 53; *Boston Chamber of Commerce v. Boston*, 217 U. S. 189; *McGovern v. City of New York*, 229 U. S. 363, and the *Minnesota Rate Cases*, 230 U. S. 352, do not apply to the facts in the case at bar.

The fact that the defendant in error did not, or could not, alone, use his property as a reservoir site, does not deprive the property of its value, as a portion of a reservoir site.

The fact that the defendant in error was the owner of only a part of a reservoir site, does not prevent that element of value being considered.

The valuation made by the Commissioners of Appraisal, was not the value of the property to the condemning

CITY OF NEW YORK *v.* SAGE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

No. 34. Argued October 27, 1915.—Decided November 8, 1915.

On condemnation proceedings adaptability to the purposes for which the land could be used most profitably can be considered only so far as the public would have considered it had the land been offered for sale in the absence of the exercise of eminent domain.

The owner is entitled to the value of the property taken; that is, what it fairly may be believed a purchaser in fair market conditions would have given for it and not what a tribunal at a later date may think a purchaser would have been wise to give.

The owner is not entitled to added value resulting from the union of his lot with other lots when the union was the result of the exercise of eminent domain and would not otherwise have been practicable.

The owner is entitled to rise in value before the taking not caused by the expectation of that event.

In this case, involving condemnation of property in New York, *held* that although maps showing the parcels to be taken had been filed and notices posted on the property, one not a resident of New York, purchasing before the petition was filed could properly remove the case into the Federal court as the proceeding was not commenced until after the petition for appointment of commissioners had been filed.

206 Fed. Rep. 369, reversed.

party, but the market value of the property in the open market, between a willing seller and a willing buyer.

If there is any conflict between the decisions of the state and Federal courts, the Federal courts are not bound, by state court decisions, on questions of general law, such as the valuation of real estate.

The entire record shows that the demand for this property for reservoir purposes, increased its market value.

Numerous authorities of the state and Federal courts support these contentions.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a proceeding for the taking of land for the Ashokan reservoir, similar to the one before us in *McGovern v. New York*, 229 U. S. 363. After Commissioners were appointed to ascertain the compensation to be paid the case was removed to the Circuit Court, diverse citizenship being alleged. There was a motion to remand which was overruled and subsequently the Commissioners reported that "the sum of \$7,624.45 for land and buildings and the further sum of \$4,324.45 for reservoir availability and adaptability being a grand total of the sum of \$11,948.90 is the sum ascertained and determined by us . . . to be paid to the owners of and all persons interested in said land for the taking of the fee thereof, designated . . . as Parcel 733." They also recommended the allowance of five per cent. on the above award for legal fees and expenses, and of \$1,372.31 to named witnesses in specified sums. The report was confirmed by the Circuit Judge, 190 Fed. Rep. 413, and afterwards by the Circuit Court of Appeals. 206 Fed. Rep. 369. 124 C. C. A. 251.

Upon an inspection of the record it appears to us, as the language of the Commissioners on its face suggests, that their report does not mean that the claimant's land had a

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Opinion of the Court.

market value of \$11,948.90—that it would have brought that sum at a fair sale—but that they considered the value of the reservoir as a whole and allowed what they thought a fair proportion of the increase, over and above the market value of the lot, to the owner of the land, subject to the opinion of the court upon the point of law thus raised. Upon that point we are of opinion that they were wrong.

The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the City's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots. The City is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give.

It is said that in this case there was testimony that the lot was worth more than the total allowed. But the only

explanation of the separation of items by the Commissioners is that they were not prepared to say that the market value of the lot was \$11,948.90, seeing that the claimant bought it a few days before for \$4,500, but that they thought the additional value gained by the City's act should be taken into account and shared between the City and the owner of the land—a proposition to which we cannot assent. *Minnesota Rate Cases*, 230 U. S. 352, 451. *McGovern v. New York*, 229 U. S. 363, 372.

The motion to remand was made on the ground that Sage bought after the condemnation proceedings were commenced and therefore was not entitled to remove the suit to the Circuit Court. The maps showing the parcels of real estate to be taken had been filed and notices had been posted on the property before the conveyance to Sage, but the petition for the appointment of Commissioners was not filed until after it had been made. We see no reason to differ from the opinion of the Judges below that the proceeding was not commenced at the date when Sage took.

Decree reversed.
